Short Form User Guide

INTRODUCTION

About this Defence Estate Instruction

1. This Defence Estate Instruction (DEI) has been prepared to assist in the effective administration of practical aspects of the Short Form Minor Works Contract developed by the Department for use when contracting for the construction of Defence facilities.

2. This DEI does not form part of any construction contract nor is it intended to be a substitute for the provisions of those forms.

3. Rather, it has been prepared to assist in understanding how the contract is to be managed from the Commonwealth's point of view once a Contract has been awarded.

4. Throughout this DEI, the importance of good communication with the Contractor to prevent problems is emphasised. It is the basis of good teamwork and a successful project, whether or not one chooses to call it Partnering. Practical tips are included together with real life experiences.

5. If this DEI is supplied to or used by persons not employed by the Department, they should obtain their own advice in relation to any matters dealt with in this DEI. The Department will accept no responsibility towards such persons for the views expressed in this DEI, it being provided solely to assist in understanding the Short Form Minor Works Contract and its application.

About the Short Form Minor Works Contract

6. The Short Form Contract developed by the Department is a document of compromise between clearly defined responsibilities and obligations and simplicity.

7. The Short Form has been developed for use in the delivery of simple Minor Works, nominally up to a value of $250,000. However the majority of these works are seen as being below $30,000 in value and often only involving a single trade.

Role of the Contract Administrator

8. In the administration of the Short Form Contract, the Contract Administrator is acting purely as an agent of the Commonwealth. This is expressly stated at Clause 3.2 'Contracts Administrator' and paragraphs 1-5 of this DEI.

9. As such, the Contract Administrator acts as an extension of the Commonwealth and does not have an independent role between the Contractor and the Commonwealth.

10. As a consequence, actions of the Contract Administrator under the provisions of both these forms of Contract would be regarded as the Commonwealth's.

11. The success of projects constructed under the Short Form document still depends upon the relationship between the Contract Administrator and the Contractor and the awareness by both of their respective rights and obligations for the specific project.

12. The following specific functions/duties of the Contract Administrator are provided for under the Short Form Contract:

Clause	Function
21.	Give instruction in the case of discrepancy, error or ambiguity in or between documents
2.2	Permit use of design within specified time if in accordance with and where that is required under, the contract
2.4	Give possession of the site of the Works in accordance with the specified requirements, sufficient to allow the Contractor to perform the Works.
2.4	Determine satisfaction as to Contractor's making good the site of the Works and its surroundings on completion of the Contractor's work.
2.4	Determine satisfaction as to evidence of insurances.
2.5	Instruct Contractor not to begin or to suspend the Works.
2.5	Instruct the Contractor regarding different conditions.
2.6	Agree or determine costs incurred by the Contractor because of different conditions (excluding delay costs)
2.6	Meet with Contractor to determine cause of delay.
2.6	Agree or determine an extension of time where delay arose from specified cause.
2.6	Extend date for substantial completion for any reason at any time.
2.7	Direct Contractor to uncover and recover work.
2.7	Direct Contractor to carry out additional testing or re-testing.
2.7	Agree or determine cost of uncovering, recovering testing or re-testing where work found to be in conformity.
2.7	Direct removal, replacement or correction of non- conforming work and specify time for such.
2.7	Determine cost of correcting non-conforming work by another Contractor.
2.8	Instruct variation to form, quality and extent of Works.
2.8	Meet and agree with Contractor or determine cost of variation excluding delay cost.
2.9	Agree when works have reached substantial completion and a stage for payment.
2.9	Determine and notify Contractor when Works reached substantial completion.
2.11	During Defects Liability Period direct removal, replacement or correction of any non-conforming part of the Works and specify time.
2.11	During Defects Liability Period determine cost of having non-conforming parts fixed by another Contractor.
2.12	If raising dispute on behalf of Commonwealth, notify Contractor and Industry expert.
2.12	Meet with Contractor to attempt to resolve dispute(s).
2.12	No further function as Decision of Industry Expert is final and binding on both parties and may not be challenged further
2.13	Notify that Contract is cancelled.
2.13	Suspend payments due or to become due.
2.13	Assess costs of substantially completing the Works by another Contractor.

2.13	Calculate difference between costs of completing by another Contractor and the amount of suspended payments plus retention monies.

BEFORE WORK STARTS ON SITE

Security Deposits

13. There is no requirement under the Short Form Contract for the Contractor to provide a security deposit. The Commonwealth retains 5% of the lump sum from payments to the Contractor (Clause 2.10 General Conditions of Contract) and therefore has funds available to have defective work etc. carried out.

Insurance

14. Insurance is required to be taken out by the Contractor under Clause 2.3.

15. The insurances to be taken out are for:

- Loss or damage to the Works - known as Contractor's All Risks Insurance.
- Injury, death, loss or damage to persons or property including the Commonwealth's (other than the Works) - known as Public Liability Insurance.
- Injury death loss and damage to employees - known as Workers' Compensation Insurance.

16. The insurances may exclude risks for which the Commonwealth is responsible i.e.:

a. Loss or damage caused by faulty design carried out by persons other than the Contractor.

b. Injury, death, loss or damage to persons and property caused by negligence, omission or default of the Commonwealth and its servants.

c. Risks commonly excluded from construction risks insurance and public liability insurance policies such as:

- war
- invasion
- act of Foreign enemies
- hostilities (whether war declared or not)
- civil war
- rebellion
- revolution
- insurrection or military or usurped power
- martial law or confiscation by order of any Government or public authority
- ionising radiations or contamination by radioactivity from any nuclear fuel or waste.

17. Where required, policies should be carefully examined for compliance as appropriate and **where necessary**, the Contract Administrator should **seek specialist advice** regarding insurance provided.

18. Some aspects to consider when reviewing policy documents are that:

a. Contractors Risk Policy -

- it expressly covers the replacement cost of loss or damage to the Works
- in doing so it is desirable that it should cover the following (as the Contractor is required to bear the risk of loss or damage)
  - temporary works and structures
  - construction plant and equipment
  - components of the works stored on site
  - components of the works during transit or whilst being fabricated or stored off site
  - materials or equipment provided to the Contractor by the Commonwealth for incorporation in the Works
  - removal of debris
  - escalation costs
  - expediting costs such as overtime wages, express freight, etc necessary to expedite repair of damage
  - costs of mitigating further damage or loss including fees to any government, local government or statutory authority.
- the level of excess (deductible) applies to each occurrence. Note - lower premiums can often be negotiated by Contractors accepting high excesses to be deducted in event of loss or damage. Whilst the Short Form may not provide a maximum excess, it must be realistic in terms of a Contractor's ability to bear.
- the names of the insured are joint (ie Commonwealth, Contractor and all sub-contractors) with:
  - i. 'waiver of subrogation' clause by Insurer agreeing not to exercise any right of recovery against any other of the Insured parties where payment or indemnity provided to any of the Insured.
  - ii. notification of claim by any of insured accepted as notice of claim given on behalf of all other parties insured.
  - iii. notices by Insurer to any party insured to also be given to all other parties named as Insured.
- the policy covers all activities required in performance of the Works and does not exclude if applicable, eg:
  - i. removal of asbestos
  - ii. tunnelling
- cover remains in force until the Works have been accepted by the Commonwealth (ie Completion), notwithstanding cancellation or non renewal ('Run-off Cover' applicable particularly to blanket policies which are arranged for specific period, not specific project).

b. Public Liability

- the policy is in joint names etc per Contractor's Risks above with a 'cross liability' clause included so that cover applies to each of the parties comprising the Insured, as a separate Insured.
- cover level is not less than specified in the Contract.|
  Note: The amount of cover is specified in Clause 2.3 of the General Conditions. The amount is set during the Contract formation phase and the Contractor's tender will be based on the specified requirements. Normally it would be expected to have a limit of $5 million, however that may have been increased if the risks and situation warranted such. It is also important to realise that there is a practical limit to the amount of cover that can be insured.
- in addition to bodily injury or damage to property of third parties, ensure other existing property of the Commonwealth (not the Works) is covered for loss and damage eg. existing building in which alterations / renovations are being undertaken.
- the policy covers all activities required in performance of the Works and does not exclude if applicable eg:
  - excavation adjacent to public thoroughfare
- it should provide cover (in excess of limit specified) for:
  - i. Defence costs
  - ii. costs of immediate medical/surgery and/or temporary repair/mitigation of further damage
  - iii. all incidental expenses incurred in the investigation, negotiation, presentation and/or defence of claims

iv. all costs awarded against or agreed to be paid by Insured with consent of Insurer in connection with any liability covered by policy

- the period of cover is until end of Defects Liability Period or rectification of all defects, which ever is the later and it should accommodate effects of extensions of time.

c. Workers' Compensation -

- must be held in accordance with the laws applicable in the relevant State or Territory in which the Works are undertaken to the maximum amount permitted by law, generally unlimited (eg. ACT)
- this policy must carry an endorsement to extend indemnity to the Commonwealth for its statutory liability to employees of the Contractor (eg. ACT - 'Principal's Endorsement' such as:
  i. Indemnity to Insured as a Principal in accordance with Annex B of the Workers' Compensation Act.
  ii. Indemnity to a Principal of Insured in accordance with Annex B of the Workers' Compensation Act.)

19. Notwithstanding the above possible considerations in review of insurance policies, it must be remembered that it is the Contractor's responsibility to bear the risk of and indemnify the Commonwealth against the liabilities set out in the Contracts.

20. As a consequence, extreme caution must be exercised in directing the Contractor relative to the insurance provisions of the relevant Contract so that liabilities are not shifted to the Commonwealth through undue interference. **It is reiterated that specialist advice should be sought as necessary relative to insurance.**

21. Satisfactory evidence of insurance must be provided to the Contract Administrator before he is to give the Contractor possession of site under Clause 2.4.

22. Determination of what represents satisfactory evidence is for the Contract Administrator to decide, but will be influenced by factors such as:

- whether it is possible to determine from evidence provided that the insurances comply with all specified requirements.
- whether cancellation or lapsing of temporary cover cannot occur without agreement of the other parties nominated as insured, i.e. Commonwealth.

23. A suggested request for evidence of renewal/extension of policies which may lapse during currency of project (i.e. annual policies) (CA1) is included at the end of this DEI.

Possession of/Access to Site

24. To enable the Contractor to perform his obligations, the Contract Administrator, on behalf of the Commonwealth, must give him sufficient access to/possession of the site to enable the Contractor to commence and continue with the works within the time limits imposed under both forms of contract.

25. It is important to note that although a Contractor may have been given 'possession of Site' or 'access to Site', the Contractor is not given sole or uninterrupted possession of or access to the Site, but only sufficient to allow the Contractor to perform the Works.

26. Under Clause 2.4, possession of site is dependent upon the Contract Administrator satisfying himself that the Contractor has in place required insurances as mentioned in paragraphs 14-31 of this DEI.

27. A delay in possession of site due to the Contract Administrator's actions, other than for paragraph 26 may entitle the Contractor to an extension of time and agreed compensation for delay under Clause 2.6.

28. A proforma of a suggested notice to the Contractor giving possession of the site (SF1) is attached at the end of this DEI.

Design

29. The Contract allows the Commonwealth to have the Contractor undertake design where that is one of the specified obligations under the scope of the Contract.

30. The key provisions of Clause 2.2 relating to design are:

- the Contractor is to develop and submit the design including drawings, specifications, calculations and engineering certification as detailed in the Design Brief.
- the Contract Administrator is to reject or give permission to use the design in accordance with the Contract. This is to be done within the specified time and if not would be a breach of the Contract by the Contract Administrator, entitling the Contractor to an extension of time and agreed compensation for each day of delay.
- it is stressed that determination of rejection or permission to use is to be based on the Design Brief and other documents. Should the Contract Administrator require items or activities in addition to the Design Brief, then the Contractor may be entitled to an extension of time and agreed compensation for each day of delay, together with a variation for the additional items or activities.
- the Contract Administrator's permission to use does not relieve the Contractor of his obligations.
- the design is to be fit for its intended purpose.
- the Commonwealth is relying on the Contractor's skill and judgement;
- the Contract Administrator should endeavour not to unduly interfere with the Contractor's design.
- the Contractor is to resubmit design until permission to use is given and he **cannot commence construction until approval is given.**

31. Proformas for notification of rejection / permission to use design are included at the end of this DEI (SF 2).

CONTACT WITH THE CONTRACTOR

Meetings

32. It is essential in the interests of good contract administration that regular meetings (appropriate to the project and its stage) occur on site between the Contract Administrator and Contractor.

33. These site meetings are a vital part of the project communication system and are valuable for agreeing facts, committing people to objectives and problem identification and solving.

34. Site meetings must be planned and managed. Minutes should be accurately recorded of Site meetings and where possible, agreed and signed by both the Contract Administrator and the Contractor.

35. It should be borne in mind that instruction may be given by the Contract Administrator to the Contractor in discussions in Site meetings, which may lead in some instances to entitlement of the Contractor to extra cost through variation, subject to notification provisions of the relevant form of contract.

36. Accurate minutes will provide a written record of the discussion and instruction in such circumstances. A sample of possible Minutes of a regular site meeting (CA 2) is included at the end of this DEI.

37. The Contract requires that the Contract Administrator and the Contractor specifically meet, for the purposes of:

a. determining the cause of delay (Clause 2.6)

b. agreeing the cost of a variation (Clause 2.8)

c. attempting to resolve a dispute (Clause 2.12)

38. Meetings for these specific purposes do not obviate the need for regular progress meetings noted above.

Notices Under The Contract

39. The Contract imposes obligations, on the Contractor and the Contract Administrator to give notice to the other party. This is to preserve contractual entitlements.

40. All notices required to be given by either the Contractor or the Contract Administrator must be given in accordance with the particular requirements of the relevant Contract provision in terms of timing and method.

41. Whilst a notice may not particularly be specified to be given in writing, it should occur in writing to provide evidence of the notice being given.

Instructions/Directions

42. With all **directions** the Contract Administrator must exercise care that he has the authority to issue the **direction** under the specific terms of the Contract and be aware that if that direction changes the obligations of the Contractor, the Contractor may have subsequent entitlements to costs and possible time.

43. Whilst **directions** are permitted to be given orally except for variations, it is good administration to confirm in writing any oral direction, so that written evidence exists if ever required to be called upon. A proforma of possible notification of confirmation of oral direction for use under either Contract (CA3) is attached at the end of this DEI.

44. Written confirmation should occur within 24 hours particularly as strict time limits may apply if the Contractor believes he has entitlement to additional costs or time as a consequence of an oral direction and the written confirmation may reset the clock.

45. In respect of the Contract, there is no express definition of 'direction' or 'instruction' nor a blanket express obligation to comply with any direction or instruction of the Contract Administrator.

46. In the context of usage in the Contract and as set out in the Macquarie Dictionary, the meaning of 'instruction' is synonymous with that of 'direction'.

47. However, the Contract Administrator still conveys to the Contractor permission, approvals, notices etc. under the provisions of the Contract which none the less represent directions or instructions by the Contract Administrator.

48. Clause 2.13 provides that if the Contractor fails to carry out an instruction or direction of the Contract Administrator, the Contract may be cancelled.

49. The effect of this provision results in basically the obligation to comply with any direction by the Contract Administrator given under a provision of the Contract.

Correspondence

50. Correspondence with the Contractor should be treated in the same manner as detailed for directions and notices above.

51. The originals of correspondence from the Contractor should not be annotated with comments - many an arbitration course has changed because of ill-conceived comment. A copy should be utilised if that is essential to be done.

52. Where a Contract allows for giving of notices under the contract by means of facsimile transmission, it must be borne in mind that thermal papers, used by some machines, deteriorate with age and also strong light/heat exposure.

53. Accordingly facsimile transmission printed on thermal paper should be copied onto plain paper for retention.

54. The Contract is silent on whether notices may be given by means of facsimile transmission.

55. However, as section 3 'Relevant Details of Contract Administrator and Contractor' provides the 'Fax. No' for each party, it would appear a reasonable implication that facsimile transmission is both contemplated and acceptable.

56. It would be prudent to also forward the originals in the normal course, such as by mail or by hand, in confirmation of the facsimile transmission and to retain facsimile transmission slips with the file copy.

Informal Contact

57. It is to be expected that informal discussions and meetings will take place during the course of a project.

58. It is imperative that the Contract Administrator **at all times** takes utmost care during any such discussions or meetings not to impart, by implication or directly, any matters that should be dealt with formally.

59. Should matters requiring notification be discussed in a preliminary nature the Contract Administrator is to ensure that formal notification (in writing) is issued promptly.

60. If there are any matters in doubt following informal contact the Contract Administrator should take steps to clarify those matters and inform the Contractor.

61. At all times it is important to record all such contact in a log or diary kept as a formal record of contact with the Contractor. This is particularly so in the case of telephone conversations which, if necessary, should be confirmed in writing if the subject matter impacts on the Contract or Contractor's Activities.

62. A possible proforma for use in recording conversations (CA 4) is included at the end of this DEI.

THE SITE

Access by the Contract Administrator and Others

63. Even though the Contractor has been given possession of or access to the Site under the Contract, as detailed at paragraphs 24-28 of this DEI, the Contract does not give sole or uninterrupted possession of or access to the Site.

64. It would be normal to expect that the Contractor had been informed at tender time of any special access and co-ordination required so that his planning and pricing could take account of such factors as necessary.

65. In this regard as much detail as is available about any other Contractors that will be working on the site at the same time as the Contractor, should have been given in a Special Condition.

66. The Contract requires the Contractor to give reasonable access to the Contract Administrator.

67. The Contract simply relies on the Contractor not being given sole or uninterrupted possession of or access to the Site.

Latent Conditions

68. The Contract provides for the Contractor to notify the Contract Administrator of conditions different from what the Contractor could have reasonably anticipated ('latent conditions').

69. Proformas for suggested notification of Latent Conditions by the Contractor are attached at the end of this DEI.

70. The proforma seeks to have the Contractor provide the following information in order that the Contract Administrator be as fully informed as possible in his determination of what subsequent direction is required to the Contractor:

- date became aware of latent condition
- in what circumstances become aware

- brief description of latent condition
- explanation why latent condition differs from that which ought to have been anticipated
- if possible, an estimation of what additional work and resources will be necessary to overcome latent condition and its cost.
- if possible, the anticipated delay that will be involved to Completion as a consequence of the latent condition and the additional work necessary to deal with it.

71. **Contractors must be made aware that those other notification obligations remain unaltered** even if the suggested proforma is utilised to notify the encountering of a latent condition.

72. The Contract at Clause 2.5 requires the Contract Administrator to give the Contractor the necessary directions to overcome the latent conditions encountered and to agree the costs (if any) incurred because of the different conditions.

73. It should be noted that the provision for latent conditions simply requires that conditions on, about or below the Site of the Works differ from those which ought to have been reasonably anticipated at Tender time in order to be considered later.

74. In addition, the treatment of delay costs (if any) is handled under Clause 2.6 separately to the physical work costs and is to be compensated at the agreed rate for each day of the agreed or determined extension of time for delay caused by the instructions given by the Contract Administrator relative to the latent condition.

75. This agreed compensation rate is the rate tendered by the Contractor relative to delay.

VARIATIONS

What is a Variation?

76. A variation is any change to the form, quality or quantity of the work which the Contractor is required by the Contract documents to perform and which is directed by the Contract Administrator under Clause 2.8 of the Contract.

77. Clause 2.8 of the Contract provides a definition of what a variation is.

78. A variation should be of the general type of work being carried out under the Contract and it should be remembered that notwithstanding the Conditions of the Contract, the Contract Administrator does not have a completely unfettered power to order variations.

79. By way of illustration, if the Contract was for construction of a single house, the ordering of a variation normally associated with a house (eg. Add rear pergola) can be regarded as being within the general nature of the Contract and the Contractor would be obliged to comply.

80. However, to order a variation to construct a second house would be regarded as changing the nature of the Contract and outside the powers of the Contract Administrator under the Contract. The Contractor would not be obliged to comply with such a direction.

81. Notwithstanding this position, if both the Commonwealth and Contractor were in agreement that the original single house Contract was to be varied on agreed terms to include a second house, then that is a different proposition as such would be reliant upon the mutual agreement of the parties, rather than the power to direct a variation.

82. One of the significant areas of common disputation revolves around what the extent of work under the contract is, which therefore sets a bench mark against which to define what a variation may be.

83. In this regard, directions by the Contract Administrator regarding discrepancies, errors or ambiguities between documents are commonly the greatest cause of variation.

84. Courts have developed various rules to interpret the meaning of Contracts. Some of the more basic rules are:

- The Contra Proferentum Rule
- In simple terms this rule states that if there is an ambiguity or uncertain or doubtful meaning in a document it will be read against the party that drafted the document.
- Expressio Unius Est Exclusio Alterius
- The literal meaning of this Latin expression is that the express mention of one thing is the exclusion of another.
- Contract Partly Written and Partly Typed
- Where a Contract has been initially typed and then the parties have in handwriting added an extra term or changed a word, then the extra terms so written will take precedence over any of the pre-written, typed form.
- Words Deleted
- This particular rule deals with clauses or words that are deleted and whether you can consider what was there prior to the deletion in order to gain a better understanding of the intention of the parties.
- Reading the Contract as a Whole
- When interpreting a specific provision, it is not sufficient to consider that provision in isolation. The provision must be read with the whole of the Contract in an effort to discover the true intentions of the parties.
- The Eiusdem Generis Rule
- This rule in essence says that where a particular type of thing is mentioned by listing and that list is followed by general words then the general words will be restricted to mean only other things not specifically mentioned in the list but part of the same type of thing as mentioned in the list.

85. In addition courts will generally find that specific clauses will override general clauses and therefore, where such conflict exists, general clauses may not be able to be enforced without a variation.

86. A Contractor may have difficulty obtaining payment for additional work he carries out voluntarily. He requires an instruction to be eligible to recover the costs.

87. An example of an exception to this general position would be where the contract provides the Contractor with the choice of say material, supplier or work method but an instruction is given by the Contract Administrator to specifically use a certain material, supplier or work method.

88. In such a case the instruction would be regarded as a variation to the Contract and the Contractor would be entitled to the demonstrable extra cost of such instruction in valuing the variation.

89. No order of precedence is specified for Contract documents to resolve discrepancies, nor is the contra-proferentum rule (see above) excluded in the Contract, thus the various rules that the courts have developed to interpret the meaning of contract documents, will apply.

Directions to Vary

90. Clause 2.8 of the Contract provides the Contract Administrator with the authority to instruct the Contractor to undertake variations to the Works i.e.

91. Clause 2.8 of the Contract does not detail what form an instruction to vary the Works must take. Accordingly, a wide interpretation may be applied and the change should be carefully defined in relation to the original drawings or specifications.

92. Whilst perhaps not strictly following the sequence of events implied in Clause 2.8, it is more than preferable to have agreed with the Contractor, prior to formally instructing a variation to be undertaken, the value of the work plus extent of delay (if any) that will arise from the instruction.

93. In this manner, the true cost implications (including delay, if any) are properly considered in the process of determining whether a variation is to be instructed.

94. It may be that following the proper consideration of **all** implications, the proposed variation is either not essential, or less costly to the Commonwealth to have the work completed as specified in the Contract and have the change carried out by separate Contract after completion of the original Works, due particularly to delay cost considerations.

95. It is recognised however, that circumstances will invariably arise where immediate instruction is required without being in a position to obtain from the Contractor, prior costing detail nor establishment of delay that may arise from the instruction. Such situations can arise where instruction is necessary to enable the Works to continue to proceed or to prevent exposure to risks of injury/damage to persons or property.

96. Proformas seeking costing details and time implications for a proposed variation prior to instruction to carry out (SF 4) and of a possible Variation Instruction (SF 5) are attached at the end of this DEI.

97. The proforma Vary Instruction (SF 5) has attempted to cover either situation, relative to valuation both prior to or subsequent to instruction as detailed above.

98. Whilst Clause 2.8 requires agreement or determination of the cost of the variation excluding delay costs (if any), there is no bar on separately identifying the agreed or determined EOT relative to delay that will arise from the instruction and the consequential delay cost that will be payable. The proformas allow for such to be obtained and agreed/determined separate to the variation direction and pricing.

99. As with all situations that may arise, careful consideration is required in following any particular 'standard forms' as they cannot be set in stone to cover all possibilities that may occur in specific Works.

100. It would however, be good administration of a Contract, for both the Contractor and Contract Administrator to follow similar mechanics surrounding notifications of variation and response.

Valuation of Variations

101. Valuation of Variations is an area of administration which often is wrongly not accorded the appropriate timely action by all or some involved in the process. It is also often an area of disputation relative to value in accordance with the terms of the relevant Contract.

102. Whilst the Contract does not expressly set any time constraint as to when valuation of a variation is to occur, it is important, if possible, to wrap up all implications of a variation (i.e. both time and cost) at the time of its instruction.

103. Various proformas have been suggested below relative to each of the forms of Contract. They attempt to assist with the mechanics of obtaining pricing information (if not already held in the form of Schedules of Prices and the like) either prior to instruction if possible or after and then notifying agreement of valuation either at time of instruction or some time later.

104. It will be for the Contract Administrator to determine which proforma may closest suit the needs and circumstances and to then mould the proforma by amendment as appropriate.

105. At Clause 2.8, it is a requirement that the Contract Administrator and the Contractor meet to agree the cost of a variation which is to exclude delay costs (if any) to be paid under Clause 2.6.

106. As noted at paragraphs 91-100 above, proformas SF 4 and SF 5 have been developed and included at the end of this DEI to enable cost and time implications to be wrapped up at the time of instruction to vary the Works, if possible.

107. Where that is not possible, proforma SF 5 provides at option 1 for the Contract Administrator to further advise regarding the meeting to agree the cost of the variation instructed, as required by Clause 2.8.

108. A proforma of a possible notice to the Contractor to meet to agree the cost of a variation (SF 6) is attached at the end of the DEI. It is considered appropriate that such notification should be given formally as failure to attend by either party would constitute a breach.

109. If unable to agree the cost of a variation the Contract Administrator must determine the cost.

110. A proforma of a suggested notice of determination of cost of variation (SF 7) is also attached at the end of this DEI.

111. In considering agreement or otherwise to the value of a variation instructed under the Contract, as there is no specific and detailed procedure of how the valuation is to be derived (other than meet and agree the cost of the variation) eg by reference to Schedules of Rates or Prices etc, the Contractor will be entitled to the payment of a reasonable sum for such work as is within the scope of the Contract.

Records to Support Variations

112. In the first instance, a variation is usually priced by the Contractor and submitted to the Contract Administrator for agreement.

113. As a consequence the onus will be generally on the Contractor to present adequate detail and substantiation of the amounts and quantities included in his variation claim.

114. Records will be essential, from both the Contract Administrator's and the Contractor's position particularly if payment method is not agreed and even if agreed, in the case of a dispute arising.

115. Records covering not only manpower resources and equipment on site, but what they were doing, when, and where must be kept.

116. Direct costs of materials, hired plant etc. should be supported as necessary by the Contractor, by delivery docket and invoice.

117. With proper provision of such records to support variation pricing, the areas of possible disputation are narrowed making agreement more easily achievable.

Omitting Work

118. The Contract Administrator may omit work by issue of a direction to vary the Works in accordance with Clause 2.8.

119. However, this power, as to extent of, or purpose for, the omission is constrained by general principles of law and the express terms of the relevant Contract.

120. Normal principles of law constraining the power to direct a variation omission are:

i. it cannot be utilised to effectively cancel the Contract

ii. it cannot be utilised to delete work from the Contract for the purpose of having that work performed by another Contractor even if the work to be deleted is considered to be a variation to the Contract in any event.

121. Without mutual agreement or express provisions in the Contract to the contrary, if the Contract Administrator directed a variation omission to the extent or purpose of (i) or (ii) above, such would represent a breach of Contract on the part of the Commonwealth.

122. By way of illustration, if the Specification requires a land area to be excavated and backfilled with soil from an adjoining site but it is subsequently discovered that the soil is unsuitable, the Contract Administrator may not engage another Contractor to provide the soil from a new source and perform the backfilling. Rather the Contract Administrator must issue the Contractor with a variation to obtain the soil and proceed accordingly.

123. Notwithstanding the above general principles, if the Contractor agreed (in writing) to such a variation under (i) or (ii) in paragraph 120 above and the terms upon which it was to occur, then that is a different proposition which will be reliant upon mutual agreement, not the power to direct a variation.

124. The Contract contains no express provisions which would permit the Contract Administrator to direct a variation omission contrary to the general principles set out at paragraph 120 above.

TIME AND DELAY

Delivery

Site Possession/Access

125. It is a fundamental obligation of the Commonwealth to provide to the Contractor access, albeit non-exclusive, to the site to perform the works in an adequate time and as provided under the Contract. It is important, therefore, to bear this in mind when completing the Contract Particulars to ensure the Commonwealth will be able to fulfil its obligations in providing access. (See also paragraphs 24-28).

126. Provision by the Contractor to the Contract Administrator of insurance details is a prerequisite to formally giving the Contractor access to the site.

127. Whilst other obligations of the Contractor under the Contract relative to security assessment of personnel may, in effect, prevent the Contractor obtaining entry to some secure areas until assessment is complete, that is not a justifiable reason to refuse to formally give the Contractor access under the terms of the Contract, Clause 2.4.

128. Clause 2.4 requires the Contract Administrator to give possession of sufficient of the site to allow the Contractor to perform the works within the stated period of days from the date of acceptance of tender or within the stated period of days from the date of giving satisfactory evidence of insurance to the Contract Administrator, whichever is the later event.

129. That is to say that giving of satisfactory evidence of insurance to the Contract Administrator amounts to a condition precedent to giving formal possession of site.

130. Discussion of what may constitute satisfactory evidence of insurance is at paragraphs 14-23 of this DEI.

131. Failure by the Contract Administrator to formally give possession of site within the stated number of days of the later of these two events, constitutes a breach of Contract by the Commonwealth.

132. Clause 2.6 provides that if the Contractor is delayed, a meeting is to be held to determine the cause. If it is determined that delay was caused by an instruction of the Contract Administrator or a breach of the Contract by the Commonwealth, then an extension of time is to be agreed or determined as appropriate.

133. Clause 2.6 further provides that where an extension of time is given for a delay caused by an instruction by the Contract Administrator or a breach of Contract by the Commonwealth, then the Contractor is to be paid 'agreed compensation' as specified, for each day of the extension of time.

134. This agreed compensation may be likened to 'damages' for the delay and disruption that may arise from a breach such as failing to give possession of site by the due date, (subject to the Contractor's own compliance with evidence of insurance.) However, the per diem rate to be applied has been fixed before the event by having been obtained from the Contractor whilst in a competitive tender situation, rather than face uncertainties and disputation that can arise in assessing true 'damages' after the event.

Other Acts and Circumstances

135. Having been given possession of/access to site, the contractor's obligation is to commence to construct the Works within the time nominated in Clause 2.5.

136. Thereafter, it is incumbent upon the Contractor to progress the Works at a satisfactory rate so as to achieve completion by the due date. This is implicit in Clause 2.13(c).

137. Failure by the Contractor to commence within the time stated, or to proceed at a satisfactory rate of progress, constitutes a breach of Contract which may see the Commonwealth taking steps under the default provisions of the Contract, Clause 2.13.

138. However, there may be events or circumstances which occur during the course of the Contract that impact upon the performance of the Works and the time in which it is to be Completed.

139. As a consequence, the Contract provides that in certain circumstances, the Contractor may be entitled to an extension of time.

140. In addition the Contract provides the Contract Administrator with a unilateral power to extend time for any reason, notwithstanding the lack of a claim by the Contractor. This power is included to protect the Commonwealth's entitlement at law to liquidated damages, particularly where an act of the Commonwealth has caused delay and the Contractor may not have sought an extension of time.

141. It is of paramount importance that the Contract Administrator be aware that time limits are placed on the performance of various duties of the Contract Administrator whether those time limitations are expressly stated or not.

142. Where a time frame is not stipulated, the law will generally imply that the action must be performed within 'a reasonable time' in all the circumstances.

143. This is appropriate particularly to keep the project running smoothly and to ensure all parties are properly informed at all times in order that they are not prevented from enjoying the benefits of the bargain they have made.

144. A common term implied into a Contract is that the parties are bound to do all co-operative acts necessary to bring about the contractual result.

145. Conversely, the Commonwealth will not hinder or prevent the Contractor from carrying out its obligations in accordance with the terms of the Contract and from executing the work in a regular and orderly manner.

146. Clause 2.6 identifies three broad areas, which if being the cause of delay, may lead to an extension of time being agreed:

a. an instruction given by the Contract Administrator (excluding a direction under Clause 2.7 'Non-Conforming Work')

b. a breach of the Contract by the Commonwealth

c. an event beyond the control of the Contractor.

147. As noted at paragraphs 42-49 of this DEI, the Contract provides no express definition of the word 'instruction'. However it can be construed widely and encompass permission, approvals, notices, directions etc, under the provisions of the Short Form given by the Contract Administrator.

148. If such 'instruction' is the cause of delay, then the Contractor has entitlement to an extension of time (excluding instructions under Clause 2.7).

149. It matters not whether the 'instruction' is permissible and correct or otherwise under the terms of the Contract. If the contractor is delayed by it, a basis for extension of time exists according to the express words of Clause 2.5.

150. Clause 2.5 also enables the Contract Administrator to instruct the Contractor not to begin or to suspend the Works. Suggested proforma notices of Suspension of Work (SF 9) and Recommencement of Work (SF 10) are attached in Annex A of this DEI.

151. It should be noted that the provision does not expressly allow for suspension of (or instruction not to begin) only part of the Works, it must be the whole Works. Reasons should be given for the suspension, even though not expressly stated as required to be given.

152. In exercising this discretion - since the Commonwealth will pay for the suspension where the necessity for it does not arise from a breach of the Contractor - the Contract Administrator should be careful and record actions taken by the Contractor arising from the suspension.

153. Use of this discretion should be in cases of emergency. It is envisaged that one need to exercise this power may relate to discovery and notification of a latent condition where it may be desirable not to disturb the latent condition before being able to investigate or consider options available to deal with it.

154. Another reason may be the necessity for protection or safety of:

i. the public or any property

ii. work already carried out

iii. employees or agents of the Contractor or Commonwealth or any person involved in carrying out the Works.

155. It should be noted that if there is a known risk in undertaking a particular project, then that should be a consideration in the choice of method of delivery. In such case, the Short Form may not be the appropriate form of Contract, regardless of value and apparent simplicity.

156. A breach of Contract by the Commonwealth is any failure by it or its agent to perform or observe an obligation under the Contract. As noted, lack of appropriate timeliness of performance or observation of an obligation can also amount to a breach, notwithstanding absence of express time limitations.

Program

157. A Contract program is a management tool of the Contractor and can be of similar use, but not to the same extent or necessarily for the same reasons, for the Contract Administrator.

158. It must be clearly understood that ultimately it is a depiction of the Contractor's estimation (at a particular time) of the work required to be performed by him under a contract and how he believes he will progress that work so that his contractual obligations as to Completion are met.

159. To interfere in the Contractor's estimations and plans generally reduces (and transfers) the risks the Contractor has taken upon himself in tendering a sum to carry out the defined Works.

160. A contract program may take the form of a simple chart with the overall duration of main stages or activities shown as bars against a time frame.

161. Apart from being a general indication of projected sequencing and durations, such a simple program will be of extremely limited use to a Contract Administrator.

162. Alternately, a contract program may take the form of a critical path (CPM) network set out to a time scale of working days stated in the Contract.

163. To be useful, a CPM program should be to a large scale and:

- include sufficient detail to describe the major elements of work within each area, zone or level and indicate the flow of work throughout.
- include allowance for usual construction details / events for which the Contractor is not entitled to extension of time.
- identify key activities by others.

  eg:- supply of documentation or information by Contract Administrator
  - approval processes by both Contract Administrator or Commonwealth and other Authorities
  - dates for Commonwealth dependent milestones
- include supply of essential materials and off site activities.
- provide estimated duration of activities and key precedence relationships between critical or near critical activities.
- provide the sequence of activities which constitute the critical path at the time of inception of the program and its logic.
- provide information on the manning and equipment requirements and productivity rates for each activity/element and stage of construction of the Works together with the logical progression of
  trades / crews through the Works. This may be more appropriately shown in some cases on separate schedules, tables or charts that are directly linked and derived from the logic and resourcing of the program.
- provide the levels of administrative, management and supervisory staff required over the duration of the Contract.

164. Effective programming requires an extensive detailed analysis and appreciation by all involved of the Work to be carried out, to properly estimate and plan its logical and efficient execution within the circumstances that will or are likely to be encountered.

165. It is important to realise that a program is not a static tool. It must be continually updated to reflect all actual actions, events, information and circumstances to remain useful in planning the execution of the Works to satisfactory and timely completion. Subject to such update for reality, the original critical path can and will invariably change.

166. Where such programs are accorded contractual status with which the Contractor must strictly comply, it is a common occurrence for them to become a double edged sword and used (abused) by an astute Contractor to further his position in claims for time and money as a consequence of the alleged affect of directions by a Superintendent (Contract Administrator).

167. Care must be exercised in relation to programs and administration of a Contract.

168. The Contract **does not require** the Contractor to submit a **program**.

169. It is suggested that if it is considered essential to have a program submitted by the Contractor that is any more than a 'general information' simple bar chart, then the Short Form Contract would not be the appropriate form for the particular works and risks involved.

Consequences and Entitlements

Extension of Time

170. The timely performance of construction contracts is of great significance to both parties to a Contract. It is also an area of a Contract and its administration which is the subject of considerable levels of disputation between Contractors and Principals.

171. The Contract requires the Contractor to progress the Works to achieve completion (however defined) within a period specified in the Contract. However, that period is subject to any extension of time that may be granted in accordance with the Contract.

172. As previously noted, the Contract Administrator can unilaterally extend the Date for Completion for any reason, notwithstanding the lack of a claim by the Contractor, to preserve the Commonwealth's entitlement at law to apply liquidated damages.

173. The necessity for this provision arose from an English case, which has application in Australia and is known as 'The Peak Principle'.

174. Whilst primarily required to enable a Principal to extend time for delays of its causing, where there may be no claim, its application may extend to delaying events of other than the Principal's making which fall within the parameters of the extension of time clause of each Contract.

175. Where it is recognised by the Contract Administrator that an extension of time is warranted without being advised by Contractor, then the Contract Administrator must extend time.

176. **Extensions of time should be considered and determined at the time the events arise.** Where no time limitations for determination are expressly stated by the Contract Conditions, the law will generally imply that the determination must be performed with 'a reasonable time' in all the circumstances.

177. The question of what is 'a reasonable time' will depend on the individual facts in each and every case, and may be as short as one or two days or as long as two or three months.

178. In the absence of the extension of time, there is a period of uncertainty to the Contractor who has been delayed, but still has an obligation to complete by, at that time, the unextended date, subject to the above considerations.

179. A Contractor is entitled to promptly know in the circumstances, the due Date for Completion that he is to plan and progress the works to achieve.

180. Failure by a Contract Administrator to deal with an extension of time claim within the time limitations stated in a Contract, or within 'a reasonable time' if no time is stated, constitutes a breach of Contract on the part of the Commonwealth.

181. The ramifications of such a breach may be quite drastic for the Commonwealth if it was responsible for the delaying event in that time may be, as often described in the industry, held to be 'at large'.

182. There is no accepted legal definition of this phrase, but in essence it arises when:

i. the Principal has prevented the Contractor from completing by the due date,

ii. the Principal is therefore unable to insist that the Contractor complete by that date,

iii. the Principal cannot or has not put in place another date for completion which takes account of his (the Principal's) delay, and

iv. there is thus no date from which to calculate the liquidated damages provided for in the Contract.

183. In these situations, the obligations to complete may well revert to the common law obligation that the Contractor only has to complete in a reasonable time which may be assessed taking into account the Contractor's original promise with respect to time, the acts of prevention of the Principal and any neutral delaying events which may have entitled the Contractor to an extension of time.

184. Failure by the Contractor to complete within 'a reasonable time', will entitle the Principal to common law damages in lieu of liquidated damages, although the Principal may have difficulty in proving the loss suffered.

185. Contractors sometimes argue that where an extension of time claim has not been addressed by a Superintendent / Principal within the period required under the Contract or at common law, in that period of uncertainty they have accelerated their work to try to meet the unaltered date for Completion and seek their costs with respect to acceleration.

186. There is in the United States, a term known as 'constructive acceleration' which it would appear that for a Contractor to successfully argue such acceleration under a Contract such as the Short Form Contract, the Contractor would need to demonstrate:

i. a delay which entitles the Contractor to an extension of time within the parameters of the General Conditions (Clause 2.6)

ii. a specific claim for an extension of time within a reasonable time or time required by the Conditions, as applicable,

iii. the failure or refusal to grant an extension of time,

iv. an expressed order to keep on the program or evidence that this was required,

v. evidence of actual acceleration.

187. It is understood, however, that despite such arguments having been around industry for many years, there has not yet been such a case successfully argued before the Australian Courts.

188. It is believed that the situation of the Contractor's obligation reverting to the common law requirement to complete within 'a reasonable time' as detailed above would be the proper position in the circumstances of failure to deal with extensions of time claims by the Contract Administrator.

189. The moral behind all the above for Contract Administrators is that **extensions of time must be dealt with expeditiously** and in a accordance with the express provisions of the Contract. Otherwise the Commonwealth's position can be seriously compromised.

190. It is important to realise that where the Contract Administrator grants extensions of time which result in the actual date of Completion equating with the date for Completion, then this indicates that the Contractor has done nothing wrong and has met his contractual obligations. In this case it is difficult for the Commonwealth to allege any counterclaim in the case of a contractual dispute.

191. A log of extensions of time, both claimed and granted, should be maintained by the Contract Administrator detailing action against each and the progressive revised date for Completion under either form of Contract.

192. A proforma of a possible Extension of Time Register (CA 5) is attached at the end of this DEI.

193. The Contract simply requires at Clause 2.6 that if the Contractor is delayed, then a meeting is to occur with the Contract Administrator to:

a. **determine the cause** of delay;
and where the cause falls within the parameters of the list of allowable events

b. **agree extension of time** within which Works can be Substantially Completed **or** as **determined** by the Contract Administrator if unable to agree.

194. Due to the nature and intent of the Short Form Contract, all the procedural requirements are not detailed.

195. The Contract Administrator should be notified by the Contractor of a delay and provided with all details necessary for the Contract Administrator to be as fully informed as possible prior to the meeting required under Clause 2.6 in order that a decision can be made.

196. A proforma for notification by the Contractor (SF 8) is attached at the end of this DEI.

197. Following notification of delay by the Contractor, or if none given but aware of a delay the Contract Administrator should formally instruct the Contractor as to the time, date and venue of the meeting required under Clause 2.6.

198. It is important this be done in writing to assist in demonstrating the Contract Administrator's attempted compliance with the Contract in the case of a dispute arising. A proforma of a suggested notification of meeting to determine the cause of delay (SF 11) is attached at at the end of this DEI.

199. Having organised the meeting, it is then necessary for the Contract Administrator to determine, on the facts available;

a. **Was the Contractor delayed?**

The words are broad in respect of this threshold question and could be taken as simply being delayed in an activity. Whether or not that activity delay translates to a delay in being able to achieve Substantial Completion is not a concern at this threshold point.

In answer to this question:

- If not, there is no valid basis for the meeting and it should not proceed further; alternately
- If the Contractor was delayed then the next step of determining causation is to be addressed.

b. **Was the delay caused by**:

- **An instruction of the Contract Administrator? (except under Clause 2.7)**

In relation to this cause attention is drawn to the wide interpretation possible of 'instruction'. (Refer paragraphs 32-62 of this DEI.)

In respect of this question:

- If so, then there exists valid basis for an extension of time, whatever its extent may be.
- If not, test against the next valid cause.

- **A breach of the Contract by the Commonwealth?**

In relation to this cause, it is to be noted that a breach of Contract by the Commonwealth is any failure by it or its agents to perform or observe an obligation under the Contract. It can include lack of appropriate timeliness of performance or observation of an obligation despite absence of stated time limits.

In respect of this question:
- If so, then there exists valid basis for an extension of time, whatever its extent.
- If not, test against the next valid cause.

- **Any event beyond the control of the Contractor?**

In relation to this cause, its meaning is broad but will be tempered, it is believed, to be those outside the 'reasonable' control of the Contractor.

By way of a simplistic illustration; a Contractor was programmed to undertake a large concrete pour of say 150m^3 on the Thursday before Easter which was required to be continuous to completion for structural reasons. The Contractor rang the only supplier in town at 10am requiring delivery to commence at 11am and continue throughout the balance of the morning and the afternoon to completion. The supplier informed the Contractor that he was unable to handle such a large batching operation on that day due to other commitments of the plant, and would not be able to accommodate it until the following Wednesday for which there had been little pre booking for supply and due to the plant not batching over the Easter holidays and RDO.

In such a case the delay to the pour would be within the Contractor's reasonable control as in the circumstances of a large pour, the timing relative to holiday period and only one supplier, the Contractor should have arranged with the supplier, a mutually acceptable supply time to meet the Contractor's program. Accordingly NO valid basis would exist for an extension given that scenario.

If, however, the pour had been prearranged for that day but the batch plant suffered a mechanical failure such that it was not able to supply until 3pm that afternoon and as a consequence the batching and pouring was cancelled to the next workday of Wednesday, the following week, then in that case the delay would be beyond the reasonable control of the Contractor. Accordingly a valid basis would exist for an extension given that scenario.

From the above it should be evident that enquiries by the Contract Administrator may be necessary to confirm the veracity or otherwise of delay claims by a Contractor under this cause and that judgement will be required in determining validity of an alleged cause under the Contract.

If an event causing delay is a consequence of the Contractor's own failure to observe or perform an obligation under the Contract, then notwithstanding instruction by the Contract Administrator relative to that failure, the Contractor should not be granted an extension of time.

200. If it is determined that the Contractor was delayed and the cause fell within the defined events of Clause 2.6 then the Contract Administrator and Contractor are to agree the extension of time within which the Works can be Substantially Completed.

201. It should be noted that the definable delay to an activity, may or may not translate to the same extent into the extension of time (if any) necessary to Substantially Complete the Works due to the activity concerned not being critical and concurrent with other unaffected activities which are critical, but the delay may partially or wholly bring the affected activity or its successors onto the critical path.

202. Whilst the Contract Administrator must try to reach agreement with the Contractor, that does not mean simple acquiescence to Contractor demands, particularly where the cause gives entitlement to 'agreed compensation' under Clause 2.6.

203. It is for the Contractor to demonstrate the effect of the delay and the Contract Administrator should probe and test the assertions and logic of the Contractor, in arriving at agreement if possible.

204. If it is not possible to reach agreement at the meeting, the Contract Administrator must **determine** a **reasonable extension of time within 14 days** of the meeting.

205. Failure to do so will represent a breach of Contract on the part of the Commonwealth and place time 'at large' as detailed at paragraphs 170-172 above.

206. As to what may represent a 'reasonable extension of time' will depend entirely upon the particular situation, however in addition to the guidelines offered above, it should be remembered that if the Contractor's own information is used as much as possible and he is afforded the benefit of doubt where such exists, then there would not be expected to be much scope for successful disputation.

Agreed Damages (for Contractor)

207. The Contract contains provisions in respect of monetary recompense to the Contractor arising from delay.

208. At the formation of a Contract, the rate of monetary recompense to be made to the Contractor in the event of extension of time for specified circumstances is agreed.

209. The agreed rate payable can either have been inserted by the Contract Administrator at time of tendering or alternately tenderers have been requested to tender this rate.

210. Where the Contract Administrator inserts the amount, it should approximate the estimated daily costs of a Contractor, with tenderers then making their own assessment and allowance as necessary, relative to adequacy of the rate.

211. Where the rate is tendered, it would be appropriate to take such amounts into account in the assessment and selection process.

212. Fixing the per diem rate to apply to particular circumstances (akin to 'damages') in the competitive environment at tender time is preferable to the uncertainties and disputation that can arise in assessing actual 'damages' after the event.

213. Where an agreed or determined extension of time is granted by the Contract Administrator, the Contractor is entitled to be paid 'agreed compensation' at the rate specified in Clause 2.6 for each day of that extension of time where it was caused by:

a. an instruction of the Contract Administrator (excluding any given relative to Clause 2.7 non conforming work)

b. a breach of the Contract by the Commonwealth.

214. Entitlement to agreed compensation **includes** EOTs for delay in possession of site, latent conditions, variations or suspension provided its necessity was not as a result of a default of the Contractor.

215. The entitlement to 'agreed compensation' flows automatically upon:

a. the EOT being given

b. the cause satisfying the criteria at paragraph 213 (a) or (b) above.

There is no requirement for a separate claim for the monetary recompense associated with delay satisfying these criteria.

216. It is envisaged that the Contract Administrator would, at the time of notifying the Contractor of an agreed or determined extension of time, also advise of the Contractor's entitlement to agreed compensation, (if any).

217. In that regard, the proforma for Variation Instruction (SF 5) has incorporated (albeit separately) EOT and 'agreed compensation' aspect options, where the whole implications of a variation were able to be ascertained prior to the instruction to carry out the variation.

218. Where that is not possible, the time and cost implications must be handled independent of the instruction when known. (Refer paragraphs 76-124 of this DEI.)

219. A proforma for notification of agreed / determined extension to Date for Substantial Completion (SF 12) is attached at the end of this DEI for use where a variation instruction is either not involved or was previously instructed without being able to wrap up all implications at time of instruction.

Liquidated Damages (for Commonwealth)

220. Where the Contractor fails in his obligation to Complete the Works within the time required under the Contract, Clause 2.6 requires that the Contractor pay the Commonwealth's genuine pre-estimated and agreed damages (liquidated damages) specified in the Contract for each day that the Contractor is late in achieving Completion.

221. As noted in this Section of the DEI, the Date for Completion (however defined in either Contract) as set out in the Contract is subject to extension for delaying events which satisfy the criteria of the particular form.

222. The Contract Administrator can unilaterally extend the Date for Completion, notwithstanding the lack of a claim by the Contractor, to preserve the Commonwealth's entitlement at law to apply liquidated damages, primarily when delay is of the Commonwealth's causing.

223. It is essential that appropriate extensions of time be granted by the Contract Administrator for delay by the Commonwealth or its agents, before liquidated damages are applied for late completion by the Contractor.

224. Clause 2.6 requires the Contractor to pay to the Commonwealth liquidated damages, at the rate specified and agreed, for each day from the due Date for Substantial Completion until the Works are actually Substantially Completed.

225. Any amount payable by the Contractor relative to liquidated damages, is in practice taken into account in payment by the Commonwealth of the lump sum to the Contractor under Clause 2.10.

226. By way of illustration, a Contract was in the lump sum of $20,000 to be paid upon Substantial Completion of the Works with liquidated damages applicable at $100.00 / day.

227. The Contractor achieved Substantial Completion 10 days later than the Date for Substantial Completion and no extension of time was warranted according to the criteria of Clause 2.6.

228. Accordingly at Substantial Completion the Contractor's payment would be:

Lump Sum Amount	$20,000
less retention @ 5%	- $1,000
Sub total	$19,000
less Liquidated Damages 10 days @ $100 / day`	- $1,000
TOTAL PAYMENT	$18,000

229. Only the retention of $1,000 would be payable to the Contractor at the end of the Defects Liability period (if all obligations were completed), meaning the Contractor will have received $19,000 of the $20,000 lump sum. In effect the Contractor has paid $1,000 in liquidated damages.

230. It should be noted that this liquidated damages provision interacts to some degree with Clause 2.13 Default, where a Contract is cancelled and the Contract Administrator has to calculate the difference between:

a. the costs of Substantially Completing the Works by another Contractor, and

b. the amount of suspended payments plus retention moneys.

231. The amount of the suspended payment due or to become due under Clause 2.10 is derived by taking into account at that time 'any costs or amounts the Contractor is to pay the Commonwealth' eg. liquidated damages.

232. Such a situation would not be encountered frequently and would be generally limited to a Contract that is cancelled after the due Date for Substantial Completion and where the Work is still not Substantially Complete. The payment that may become due under Clause 2.10 in such an instance would have to take into account liquidated damages for the period from the due date for Substantial Completion to the Cancellation / Suspension of payment.

233. Specialist advice may be appropriate in such cases.

PAYMENT

General

234. A fundamental obligation of the Commonwealth under the Contract is to pay the Contractor for the performance of his promise under the Contract.

235. Failure by the Commonwealth to make payment in accordance with the Contract, represents a breach which may (subject to express provisions of the Contract and circumstances) at minimum entitle the Contractor to damages, or at worst to terminate the Contract because of repudiation by the Commonwealth and restitution on a quantum meruit basis.

236. The Contract Administrator must notify the Contractor (under Clause 2.9) of when:

a. a stage for payment (if specified) was reached; and

b. the Works reached Substantial Completion.

Whilst no specific time period is stated that notification must be made within a reasonable time. Failure to notify, or notify in a reasonable time, will represent a breach of Contract with consequences as detailed at paragraph 235 above.

237. Upon that notification, the Contractor must give the Contract Administrator an invoice showing:

- Purchase Order number
- Stage reached
- Amount payable
- Monies previously paid (if any)
- Total claimed on invoice.

238. The amount payable (excluding default situations at Clause 2.13) will be either

a. **at the Stage specified in** Clause 2.10,

- the relevant amount set out against that stage.

less

- retention at 5% of lump sum from 1st stage (and if necessary the balance from subsequent stages if the retention sum happened to be greater than the amount payable against the 1st stage). NB. No more than 5% of lump sum may be held as retention in total.

b. **at Substantial Completion,**

- the lump sum

plus

- other amounts agreed or determined by Contract Administrator as payable under the contract, for:

  - different site Conditions (latent conditions) (Cl.2.5)
  - agreed Compensation for delay in Substantial Completion (Cl.2.6)
  - uncover, test / retest, recover work in conformity with Contract (Cl.2.7)
  - variations (Cl.2.8)

plus

- amounts arising from decisions of Industry Expert (if any) (Cl.2.12)

less

- retention at 5% of lump sum

less

- net amounts already previously paid by the Commonwealth, set out against relevant stages (Cl.2.10)

less

- amounts the Contractor is to pay the Commonwealth for:

  - liquidated damages for each day late in achieving Date for Substantial Completion (Cl.2.6)
  - cost of correcting non conforming work determined by Contract Administrator (Cl.2.7)
  - amounts arising from decisions of Industry Expert (if any (Cl.2.12)
  - share of costs of the Industry Expert where not paid by Contractor (Cl.2.12)

or

c. **at end of Defects Liability Period**

- the Retention held at (a) and (b) above (should have been 5% of Lump Sum)

less

- any costs the Contractor is to pay the Commonwealth for:

  - cost of correcting non conforming Work determined by Contract Administrator

239. By way of illustration, relative to payments above,

A. **Theoretical Scenario**

1. Lump sum $60,000.

2. Stages and amounts specified by Contractor at Clause 2.10.
   Stage 1 - Foundations, slab, underground services $20,000
   Stage 2 - Lockup of Structure $30,000
   Stage 3 - Substantial Completion $10,000

3. Variations instructed during progress of Works:
   VO1. Provide underground power reticulation in lieu of overhead addition $580
   VO2. Provide extra window addition $785
   VO3. Supply and Install electric stove addition $1,020

4. Different site conditions costs
   (Diversion of services around unknown old sub surface structure) addition $2,845
   plus EOT of 4 days.

5. Agreed rate for Compensation $1,100 / day

6. Liquidated Damages $350 / day

7. Works brought to Substantial Completion 10 days later than extended Date for Substantial Completion.

8. During Defects Liability Period of 3 months the Contractor was directed to repair the front concrete paving, which had cracked and settled, within 21 days of the notice which coincided with the end of the Defects Liability Period. The Contractor failed to undertake rectification and the Contract Administrator determined that the cost of rectification by another Contractor would be $750.

B. **Payments during the course of the works would be**:

P.P.1. At reaching Stage 1.GROSS PAYMENT	$20,000		
less Retention @ 5% x $60,000		$3,000	
	NET PAYMENT		$17,000
P.P.2. At reaching Stage 2	NET PAYMENT		$30,000
P.P.3. At reaching Substantial Completion (Stage 3)			
Lump Sum		$60,000	
plus			
• VOL 1	$550		
• VOL 2	$785		
• VOL 3	$1,020		
• Diff Site Conditions	$2,845		
• Agreed Compensation 4 days @ $1,100 / day	$4,400		
Sub total Extras		+ $9,600	
Sub Total		$69,600	
less			
• Liquidated Damages 10 days @ $350/day	$3,500		
• Amounts previously paid			
P.P.1. (NET)	$17,000		
P.P.2. (NET)	$30,000		

• Retention monies (5% x $60,000)	$3,000		
Sub total deducts		-$53,500	
	NET PAYMENT		$16,100
P.P.4. At end of Defects Liability Period			
(Final) Retention held at PP3.	$3,000		
less			
rectification cost of non-conforming work	$750		
	FINAL NET PAYMENT		
			$2,250

240. It is possible that a matter in dispute may not have been resolved by determination of the Industry Expert at the time of Substantial Completion and associated payment. In such instance a special extra payment to that at Substantial Completion, should be processed if necessary as a consequence of the Expert's decision.

241. It should not be left to the final payment at end of Defects Liability Period which may not be for a considerable period.

242. Where a dispute arises relative to direction on non-conforming work, given during the Defects Liability Period, the Expert's decision would be accounted for in the final payment as necessary.

243. As noted at Clause 1.4 'Information to Tenderers and Conditions of Tender', the Commonwealth prefers to effect payment on Substantial Completion of the Works, but should a tenderer require progressive payment then the stage and amount is to be stipulated.

244. A point worthy of consideration prior to accepting a tender with progressive payment and stage stipulated, is that there can be a tendency for tenderers to load payment for early stages, not least to offset retention monies.

245. This can sometimes compromise the Commonwealth's position in the event of default occurring, by having paid in excess of the true value of works actually carried out or failing to have effective retention with little or no monetary incentive for the Contractor to complete/rectify.

246. Appropriate care should be exercised in consideration of tenders stipulating progressive payment that the amounts sought are not greater than the value of the work at the particular stage. If excessive they should be renegotiated prior to acceptance and the formation of the Contract.

247. All amounts payable are required to be paid by the Commonwealth within 30 days of receipt of an invoice from the Contractor noted at paragraph 237 above.

248. Payment by the Commonwealth of any due amount outside such time limitation would represent a breach of Contract entitling the Contractor to damages outside the Contract at common law.

249. The Contract Administrator has no express power under the Contract to determine any entitlement the Contractor may have in relation to such a breach by the Commonwealth. Should such a situation arise, specialist advice should be sought on the particular circumstances that may exist.

250. A register should be maintained of payments made both individually and in cumulative summary under the Contract, against the Contract sum as individually adjusted by extra costs and deductions determined under the terms of the Contract and cumulative result. This register would allow the Contract Administrator ready access to financial position on a Contract whenever required.

251. It should be remembered that in determining whether Works have reached a particular stage nominated (except Substantial Completion) in the Contract, it is generally only intended to be a point to enable a progress payment to be made under the Contract. (Refer Clause 1.4 of Short Form.)

252. Reference would have to be made to the description of the stage and it would be good practice for the Contractor and Contract Administrator to undertake a joint inspection on site either just prior to or just after notification by the Contractor of opinion that a stage had been reached.

253. In implementing such a practice, differences as to whether the stage has been reached can usually be aired and resolved at the inspection so that the Contractor receives his correct entitlement under the Contract when due.

254. In relation to Substantial Completion however, reference must be made to the definition at Clause 2.9 of when Substantial Completion has been reached ie

a. the Works are to be capable of use for their intended purpose, and

b. the Works are finished except for minor defects (ie minor shortcomings which do not affect use for intended purpose.)

CLAIMS

Claims Generally

255. A claim is a demand for something alleged as due, which in the Construction industry is primarily time and / or money.

256. The three basic areas of claim are:

a. Contractual Claims

b. Extra Contractual Claims

c. Moral Claims

It is not uncommon to encounter claims containing all three of the above elements

Contractual Claims

257. Contractually based claims are claims that would be valid under the terms of the Contract and considered legally enforceable.

258. Examples of such claims could, depending on the terms of the particular Contract, be:

- claims for variation to the work
- claims due to delay
- claims arising from latent conditions encountered

259. Any claims submitted by a Contractor which are contractually based, must clearly identify the provision of the Contract under which they are claimed and are reliant upon.

260. Contractual claims must take cognisance of precedence of documents or rules of interpretation, if any is stated in the Contract, or what precedence or interpretation would likely to be given by a Court or an Industry Expert. A Contractor should be sure that he is not reliant on one provision that is overridden by another.

Extra Contractual Claims

261. Extra contractual claims are claims that generally have a valid legal basis that arises outside of the terms of the Contract.

262. Claims such as these can arise where there is an alleged difference between what was anticipated and what was actually encountered during the course of the Works, and can relate to duty of care as regards information supplied. The Contractor would have to be able to show that he relied upon the information and that it was carelessly or negligently given and caused him damage.

263. A Contractor making a claim on this basis will need to consider very carefully why the problem has occurred and not just look at the obvious. It would be necessary for him to do some dimensional analysis listing all the criteria which **could** have caused the problem then logically determine the reason behind that and tie it back to the extra contractual basis of claim.

264. This sort of argument would be expected to be apparent in a claim which relies on common law rather than the Contract.

265. This type of claim can also arise where there has been a breach of the Contract by the Principal which can then provide the Contractor with remedies at common law, if not particularly provided for or constrained under the terms of the Contract.

The Moral Claim

266. As is obvious from the title, this type of claim is devoid of legal backing but one on which a Contractor may genuinely have lost money and therefore seeks sympathy from the Principal.

267. In the case of the moral claim, a particular area that often arises is costs relative to widespread industrial disputation over which neither the Contractor nor the Principal may have had any influence, however the Contractor has suffered a genuine loss and seeks some recompense.

268. Claims on this basis would require payment by way of an 'act of grace' on the part of the Commonwealth which is rare and requires special authority from Department/Minister of Finance.

Notification - Timing

269. The first requirement of a Contractor with respect to contractual or extra contractual claims, is to comply with the notice provisions provided for by the Contract.

270. Whilst in the past there may have been discussion and argument as to enforceability of time bars within various clauses of various standard forms of Contract in use in the Industry, time bars generally should not be lightly dismissed where a Contractor has not complied.

271. Various standard form Contracts, including some of those in the Department of Defence's suite, now include stringent provisions as to notification with respect to both contractual and extra contractual claims, which are believed will be held as effective time bars in the event of non compliance.

272. To ensure there are no 'hiccups' with a claim, Contractors are advised to ensure they do comply with the notification provisions of the Contract.

273. It should be noted that the actions of a Contract Administrator or Principal in respect of time bar / notification provisions can affect the standing of the particular provision at law (i.e. estoppel or waiver).

274. If by a Principal's or Contract Administrator's actions it could be argued by the Contractor that the Principal or Contract Administrator was not going to rely upon those provisions, then the Principal or Contract Administrator cannot rely on them at a later date, to subsequently reject the claim on that basis.

275. Such action may be as simple as proceeding to consider the merits of the claim notwithstanding non compliance with time bars.

276. Accordingly, the Contract Administrator must carefully consider his actions upon receipt of a claim and it is strongly suggested that the express wording of the Contract be applied to protect the Commonwealth's position.

277. The Contract does not contain any notice provisions or time bars in respect of claims submitted by the Contractor, hence there is no requirement to submit claims within any particular time period.

278. Any claim submitted will have to be dealt with on its merits regardless of time of lodgement.

279. The Contract Administrator should ensure that no claims are outstanding before the release of retention moneys at the Completion of the Defects Liability Period.

280. It is commonly accepted good practice to obtain from the Contractor, just prior to final payment at end of Defects Liability Period, a 'release of all claims' to ensure, from the Contractor's point of view, that no claims and issues do remain unresolved. A copy of a possible simple proforma release (CA 6) is included at the end of this DEI.

Notification - Particulars and Documentation

281. Often, Contractors tend to provide scant details as to an entitlement or quantification. This is unfortunate and tends to put a Principal offside from the outset.

282. Notwithstanding specific provisions of particular Contracts and in order to better understand the detail required of the Contractor, it is worthwhile considering the general principle of law which provides that a respondent or a defendant to a claim (or an action) is entitled to know the case / claim that he has to answer.

283. By this he is entitled to be fully aware from documentation produced or given to him as to the precise details of the allegations being made and the costs or damages that flow from those allegations.

284. With this in mind, it is not difficult to identify what the Contractor should give the Commonwealth Contract Administrator, however, it is often hard to extract such information.

285. A recent decision in the Queensland Supreme Court (under appeal) did give some insight into what the Courts determine are adequate particulars when the Judge noted:

'In my view neither the superintendent nor the principal could on this material have reached a considered judgment which in the case of the principal may have become the subject of a subsequent arbitration. The documents evidence something of an ambit claim which identifies the general nature of the case which the applicant would seek to assert and the money sum which evidences the total of the quantum meruit claim. However in my view the documentary material although voluminous does not represent the kind of particularity needed, and in fact required, by the contract so as to permit of sensible decision-making by either the superintendent or the principal in the lead up to arbitration proceedings. No doubt the arbitrator would have the power to order the delivery of points of claim and defence and to require further and better particulars. However Clause 45 in its express terms is designed to require the provision of 'detailed particulars' upon the taking of the first step. It seems to me to be contrary to the spirit and indeed to the letter of the contract to permit of one party to avoid its obligations or to perform them imperfectly in the taking of the initial step leading to arbitration in the expectation that it can be cured later. Clearly the intention is that arbitration may ultimately become unnecessary because of the intervention for intermediate decision-making by both the superintendent and the principal. Rather the commercial reality involved in Clause 45 is the making of a specific claim in respect of a dispute supported by detailed particulars which are such as to enable the superintendent or the principal to decide it there and then upon its merits. In this case there remains also fundamental question as to whether the contract remains binding on the parties or whether the contractor is entitled to claim a quantum meruit.'

286. Accordingly, in making a claim upon a Principal, be it in accordance with the Contract or an extra contractual claim, the Contractor has to be prepared to clearly identify the provision on which he is relying, or if it is common law, the law on which he relies by not only simply stating that clause or law, but by the provisions of details or particulars to identify and demonstrate why that particular provision is applicable.

287. In addition to establishing entitlement to costs, the Contractor must provide evidence and factual backup to support the actual costs claimed, subject to any provisions of the Contract that may have been agreed at Contract formation which are to be utilised for determination of moneys payable. (eg. agreed compensation Clause 2.6)

288. Depending upon the event and the provisions of the relevant Contract, the Contractor may have no entitlement; through extra cost incurred; to damages; or quantum meruit.

289. The term 'extra costs incurred', as stated in earlier sections of this DEI basically means moneys actually paid as a consequence of the event, which are in addition to that which would have been paid had the event not occurred, and do not include such things as off site overhead nor profit.

290. Extra costs incurred should be factually demonstrable from invoices and dockets as compared with and related to the actual original estimate, subject to the adequacy of that original estimate.

291. It is important for both Contractors and Contract Administrators to realise that the Commonwealth is neither obligated nor in the position of compensating a Contractor for a poor tender. A Contract Administrator legally cannot disburse Commonwealth money without a clear and substantiated legal basis for claim.

292. Extra costs are not considered to be a damage and depending upon the terms of a Contract can flow from an event that would normally be considered to be a breach of Contract, but for the specific Contract provisions.

293. By way of illustration failure to give access to site by the date stipulated represents a breach under Clause 2.4.

294. 'Damages' generally flow from a breach of the provisions of the Contract by the Commonwealth (or its agents), whereby the Contractor is entitled to be put in the position that he would have otherwise been in, had not the breach occurred, subject to certain principles such as mitigation and remoteness.

295. Heads of damage recoverable are wider than 'extra costs' and may include items such as off site overheads and profit where such are reasonably foreseeable and arise naturally from the breach itself. In some circumstances recent decisions have suggested that compounding interest may be a head of damage however, specific legal advice should be sought on that point and the particular circumstances.

296. The Latin term 'quantum meruit' means 'as much as he has earned' or basically, the reasonable value of the work carried out, regardless of the amount that may have been payable under the Contract.

297. Such entitlement at common law is rare and may arise where an innocent party terminates a Contract by acceptance of a defaulting party's repudiation and sues for the value of work done before repudiation, on a quantum meruit basis.

298. Alternately, where it is held that a valid Contract no longer exists, the Contractor may be entitled to payment for the reasonable value of work done, i.e. quantum meruit.

299. As claims on a quantum meruit basis are rarely successful, specific legal advice should be sought in respect of such a claim.

300. In terms of the actual pricing of the claim the following costs would be considered to be necessary, dependent on the nature of the claim:

- material costs
- equipment costs (itemised for each piece of plant and equipment)
- sub-contractor costs
- other direct cost
- on-site overheads (eg. site facsimile machine)
- off-site overheads (eg. pay office)
- indirect costs (eg. insurance)
- statutory overheads (eg. payroll tax)
- recurring overheads (eg. rental)
- non-recurring overheads (eg. Establishment)
- etc.

301. The methods a Contractor can use to support these costs can vary but in general terms they must either be referred to the original bid rates, or if argued to be not applicable, to a standard that is acceptable within the industry.

302. The calculating methods may be based on:

- Actual costs

i.e. those costs that are substantiable from actual historical cost records which have been regularly maintained as the costs are incurred. The cost records which should be utilised include time sheets, payroll records, equipment logs, progress schedules, invoices etc. Informal records which are systematically kept to record the costs of a particular activity impacted by a delay or breach may also be useful to establish actual costs. The actual cost of a claimed event must take into account what the Contractor's costs would have been, without the event as there should be neither an increase or a decrease in losses that would have been suffered but for the event, nor should there be any rectification of a mistake to avoid a loss.

- Total costs

i.e. the total costs of the work performed is taken and from it is subtracted the tender estimated cost of the work which should have been performed, had it not been for the event/s. This method generally does not recognise that:

1. The total costs incurred include costs that may well be attributable to the fault of the Contractor and not caused by the claimed event.
2. The estimate of what it would have cost to perform the work, unaffected by the claimed event/s, is frequently based upon unrealistically low tenders and estimates.

- Comparative costs

i.e. a refinement of the total cost approach above in which an independent expert is engaged (or industry standard is utilised) to re-estimate the cost of performing the activities that would have been incurred based on the original requirement, without impact of actual job site claimed events, subtracted from the actual cost of performing those activities. In addition further refinement is made to reduce actual costs of performing the impacted work activities by amounts attributable to the Contractor's own inefficiencies or non claimable events. This method is claimed to eliminate many of the inaccuracies and 'windfalls' which may be present in a pure total cost approach.

- Reasonable costs

A cost is reasonable if, in it's nature or amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business.

Costs derived from historical cost records as under 'Actual Costs' above will generally be presumed 'reasonable' where there is nothing in the records to show that the Contractor's tender was too low and where it cannot be proved that the costs were unreasonable, or that the Contractor was itself responsible for any increased cost.

- Audits

ie Certification by independent experts that costs claimed have actually been incurred which may encompass analysis of the claim elements and claimed costs with opinion that such costs were incurred and are a valid statement of the extra costs attributable to the claim.

303. With respect to the costs, it is important to bear in mind that at the end of the day, the Contractor will be required to demonstrate his actual costs, not those based on some theoretical calculation.

304. Dependent upon the nature of the claim, the following documents should be provided by the Contractor with the claim.

- Original Contract program
- Subsequent Contract programs
- As built schedule
- Timesheets

- Paysheets
- Plant work sheets
- Daily work sheets
- Equipment hire
- Sub-contractor costing
- Supplier costing
- Monthly cost sheets etc.

305. Regardless of the specific contractual provisions that may apply, common sense dictates that if a Contractor wishes a claim to be taken seriously and resolved quickly, it is in his own interest to ensure that the claim is fully documented and substantiated, without the gross exaggeration which is unfortunately all too prevalent.

306. Whilst the Contract Administrator may probe and test the veracity and validity of the claim, it is to be remembered that the onus of proof (on the balance of probability) lies with the Contractor as claimant and the Contract Administrator should not attempt to 'make the claim' for the Contractor.

307. The Contract Administrator is entitled to have sufficient information put before him to be able to make a properly informed decision on the matters at issue raised in the claim.

308. The Contract does not contain any provisions as to level of particularisation required relative to claims.

309. As the Contract provides an agreed compensation rate for delay at Clause 2.6, it is envisaged that resolution of claims will be simplified as this area normally constitutes a large proportion of claims made.

310. Notwithstanding the agreed compensation provision, a Contractor is not prevented from claiming general damages in relation to a breach of Contract.

311. In context of the preceding general comments on particulars and documentation required, for claims submitted under the Contract, the Contractor should in summary, provide the following:

1. Whether the claim is based upon the Contract Conditions including specifications or not.
2. The facts relied upon in support of the claim, including sufficient detail to verify the claim.
3. Details of the quantification of the sums claimed.

Analysis

312. The Contract Administrator is required to analyse claims submitted, assess entitlement in accordance with the provisions of the contract and to give his decision to the Contractor all within a reasonable time.

313. For the Contract Administrator (or any specialist advisers engaged to assist) **to properly analyse a significant claim, the following information will in general terms be required,** although not all may be applicable to any particular claim:

i. A copy of a complete set of Contract documents including a full set of the award drawings. Documents often have annotations on them and hence one cannot be completely sure of what was added after the event. This particularly applies to drawings.

ii. Technical reports including such things as bore logs, geotechnical surveys, process information, raw materials, analysis and the like. Often Contracts have disclaimers that this information is supplied at tender time without the Principal accepting responsibility for the same. However, to defend a latent condition claim, this background information is essential.
It may be necessary in the initial examination of a claim to check the accuracy or otherwise of information given which a Contractor has relied upon. This would particularly relate to previously noted Latent Conditions claims under the Contract or extra contractual claims.

iii. Drawings that have been issued throughout the job. Drawing registers should be kept and transmittals used to send and receive drawings. Previous revisions of drawings must not be destroyed. It is important to be able to look back through each of the various revisions to the drawings and to compare these with the Contract drawings as this could be the very basis for scope change claims.

iv. Programs fall into a similar category as drawings with the various revisions needing to be kept. If programs are necessary then the Contract will clearly set out the requirements for the production and issue, yet regularly Contractors do not go to the trouble at tender time to produce an effective programme and Contract Administrators do not enforce it. Claims regularly hinge around what the Contractor alleges he was going to do. If Contract Administrators enforced the contractual obligation in this area and required a fully detailed program at the start of the project as specified, this would be an area of claim more easily controllable.

v. Correspondence to and from all parties including third parties that may become peripherally involved such as the concrete supplier or the pipe supplier. It is preferable for ease of reading and referral to have the different types of correspondence filed separately, however, during analysis often a chronological file is more relevant.
In this regard it is often necessary when analysing a claim to go back in quite minute detail to establish clearly what the progression of events was, what happened when and who was responsible.
In the majority of claims one of the first tasks is to clearly establish on a factual basis what happened.

vi. Site instructions and site memorandums in their own right often tell the story of the Contract particularly the attitude adopted by persons in authority on sites. They should be reviewed carefully and their contents, particularly relevant to delays, variations and possible change in the order of work should be noted.

vii. Meeting minutes are often the documents that consolidate the weekly thoughts of the parties, particularly at the interface between Contractor and Contract Administrator.

viii. Variation documents including requests, orders, quotations, estimates and advices, are the source of scope change claims and can substantiate quantum changes.

ix. Diaries again can prove critical in disproving a claim. They should be kept both at the site and at the office noting items of useful interest. Diaries should be kept up to date with a check being made weekly by a responsible person. Consider what is being written in the diary, eg. 'Argued with the boss again today' may cover your backside relative to your position if the claim is not settled, but may not help support the Commonwealth's defence.

x. Daily site reports are most useful to reconstruct a project and therefore should be accurate and comprehensive. They should be the responsibility of a single competent person on site.

xi. Unseen documents should not be disregarded as they could prove useful. They can include environmental reports, Government Development Approvals, Council submissions and the like.

xii. Suppliers documents including batch plant records, concrete test records etc would be of similar use.

xiii. Inspection and testing reports from outside parties - if someone is inspecting or testing the work a copy of the report should be obtained for record and future use.

xiv. Finally job photographs are most important if some part of construction, subject to claim, is to be covered up. Progress and problems also can readily be seen by photographs. Make sure some are taken from the same spot on a regular basis, that all are dated with a description of their purpose, and that the photographer is known and is able to put a description to the photo.

314. Factual analysis of the claim will firstly be required against the provisions of the Contract, that the Contractor claimed events have arisen and identify what entitlement (if any) the Contractor may have in respect of the event claimed i.e. 'extra costs' or 'damages'.

315. Technical issues related to specification requirements may require appraisal to ascertain veracity of allegations or extent of liability (if any).

316. Having established a contractual and technical liability the Contractor's claim will require critical examination to ascertain whether it fits the entitlement claimed eg. cost, expenses, damage, loss and what likely assessment of entitlement may be made by an independent third party.

317. One of the basic principles that should be observed in assessing quantum is that if the Contractor has incurred extra costs as a result of a breach of the terms of the Contract by Commonwealth (or Contract Administrator) then subject to the provisions of the relevant Contract, the Contractor has an entitlement to be put in the position that he would have otherwise been in, had that breach not occurred. Often it is found this is not considered when examining a quantum of the claim and to be able to strictly carry out this function, then details of the Contractor's tender are required.

318. In terms of delay the Contract provides agreed rates of recompense to the Contractor.

319. In addition various provisions contain express limitations as to recompense should the event occur, for example:

a. Latent Conditions (Refer paragraphs 63-76 of this DEI)
   Clause 2.5 - 'Costs incurred' for physical work; 'Agreed compensation' for EOT for delay (if any)

b. Delayed Access (Refer paragraphs 24-28 of this DEI)
   Clauses 2.4 and 2.6 - 'Agreed compensation'

c. Late Payment (Refer paragraphs 234-254 of this DEI)
   Clause 2.10 - No express entitlement for breach therefore common law entitlement to damages

320. However, where the provisions of the Contract do not expressly provide for or constrain the consequential entitlement of a breach, the Contractor may be entitled to have costs assessed against such things as:

- ability to recover a profit on a given project (if profit was to be made)
- cost of financing
- cost of disruption due to introduction of variations
- cost of delay with respect to off-site and on-site overheads
- reasonable value of works that are arguably outside of the scope of the original tender.

321. Difficulties are bound to arise in relation to administration of claims and it is beyond the limits of this DEI to adequately cover all possible circumstances and applications.

322. It may well be necessary to obtain external technical and / or legal assistance in respect of complex claims to arrive at a proper impartial position as to entitlement. The more thorough the examination at claim analysis stage the easier it is to enter upon properly informed negotiation and / or the easier preparation becomes for any action that may ensue, should the matter not be settled.

323. Whilst it must be noted that settling of a claim is more desirable than embarking upon the path to litigation or arbitration, that position must be tempered by the requirement for proper substantiation and analysis of a claim, not simply a desire to settle at any cost. The information set out in this section of the manual hopefully highlights the information and steps necessary in arriving at a proper position relative to a claim, which should assist in negotiation and arriving at an acceptable resolution with a Contractor.

QUALITY/DEFECTS

324. The required quality of the work to be produced by the Contractor is defined within the express or implied terms of the Contract, and generally by the specification and drawings.

325. Quality is defined in Australian Standard AS 3905.2-1993 as:

'the totality of features and characteristics of a product or service that bear upon its ability to satisfy stated or implied needs.'

326. Where there is no express requirement, in a Contract to perform any work, as to how the Work is to be carried out, it will be implied that the Work shall be done in a good and workmanlike manner, by workers who have the ordinary level of skill as those exercising the particular trade or calling.

327. Provided there is nothing to the contrary expressed or to be implied in a Contract, where no material is specified, a Contractor will be implied as warranting that the materials supplied by him for incorporation in the Works, will be reasonably fit for the purpose for which they are intended and are of good quality.

328. Where a particular material is specified either by detailed requirements or brand name, or specific supplier from whom material must be obtained without reliance on the Contractor's skill, the situation becomes unclear. Depending upon circumstances the warranty by the Contractor for fitness may be excluded. In such a case a Contractor may insist on the risk of defective material lying with the Commonwealth.

329. As a general rule, where a Contractor is employed to carry out work and the Commonwealth relies upon the skill and judgement of the Contractor as to suitability of materials and design proposed for the purpose of the finished Work, and the Contractor represents itself as being competent in such matters, then there is an implied warranty by the Contractor that the materials and design will be reasonably fit for their purpose.

330. It is essential if this warranty is to apply, that the Commonwealth, with knowledge of the Contractor, should be reliant upon the Contractor's skills and judgement and not otherwise.

331. Clause 2.2 ('Design') clearly states, where design is part of the Contractor's obligation under the Contract, that 'the Contractor knows that the Commonwealth is relying on his / her skill and judgement in undertaking design'.

332. This express provision is designed to ensure existence of the essential element required for there to be the implied warranty as described at paragraph 329 above.

333. Notwithstanding this provision, if the Brief specified mandatory use of particular materials in certain situations or methods of undertaking the Work, the effectiveness of that warranty may be weakened.

334. Where a Contractor has concerns within his design as to suitability of Commonwealth specified materials or methods of execution, the Contractor would, it is believed, have a duty to warn the Contract Administer / Commonwealth of those concerns.

335. Under Clause 2.7 'Non-Conforming Work', the Contractor is obligated to supply materials and standards of workmanship which conform with the Contract, the Building Code of Australia, relevant standards and other requirements imposed by law.

336. In addition materials are expressly specified at Clause 2.7 as being required to be new, free from defects (i.e. shortcomings) and suitable for the purpose.

337. It is the broad provisions of these two clauses, in addition to the specific provisions of the technical specification, drawings and brief (if applicable), that provide the benchmark against which the physical work is to be compared for compliance as it is being performed.

Quality Assurance System - Monitoring

338. Greater reliance is being placed upon Contractors being responsible and accountable for ensuring that the quality of the work they produce meets the contractual and legal obligations imposed upon them in undertaking works or services.

339. The emphasis is towards the prevention of non-conforming work from being produced at all stages from design through to servicing, rather than detection and correction after the event, however both areas have an appropriate role to play in any overall system to maintain required quality.

340. To give effect to this requirement Contracts are increasingly specifying that Contractors must have in place, appropriate systems which meet specific standards, that assure a Principal that the quality of a product or service will be in accordance with the Contract requirements and place responsibility for achievement and demonstration of achievement with the Contractor.

341. In addition, the implemented standard of system and accreditation of the Contractor is being used as an important criterion in consideration of tenders received and selection of a tender representing value for money.

342. The selection and implementation of a quality system should not change the contractual obligation of the Contractor to construct a product or provide a service which meets the specified requirements.

343. An appropriate quality system should be carefully considered and selected and conform to the minimum requirements necessary to enable prevention or detection and correction of possible non-conformance's which occur during the performance of the Contract.

344. Such an appropriate system is to provide both the Commonwealth and Contractor with assurance that the quality requirements have been met, backed up by objective evidence.

345. A quality system is the organisational structure, responsibilities, procedures, processes and resources for determining and implementing the intentions and directions of the Contractor's management relative to quality.

346. According to Australian Standard AS 3905.2-1993, such a system may consist of a sub-system of elements covering the following areas, documented by records, such as:

Quality system elements	**Typical quality records**
Management responsibility	Minutes of management reviews
Quality system	Quality manual, quality plan and quality system procedures
Contract review	Minutes of tender/contract review
Design control	Design and verification plan, design inputs/outputs, change authorisation
Document control	Register of signatories for approving docs. - register of current document. revisions
Purchasing	Register of acceptable suppliers
Purchaser supplied product	Purchaser's verification records/reports
Product identification and traceability	Product/batch records
Process control	Method statements, work instruction, sample/written workmanship standards, records of personnel qualifications and method qualifications
Inspection and testing	Inspection & Test Plan (ITP), inspection/test reports
Inspection, measuring and test equipment	Register of equipment/calibration frequency, calibration certificates
Inspection and test status	Register of authorised personnel
Control on nonconforming product	Nonconformance reports, defect reports
Corrective action	Corrective action reports
Handing, storage, packaging and delivery	Delivery dockets, dispatch advices
Quality records	Inspection/test reports, audit reports
Internal quality audits	Audit reports, corrective action reports
Training	Qualification records, training course records
Servicing	Job cards, visit reports
Statistical techniques	Control charts

347. It is for the particular Contract to specify which (if any) of the three Australian Standard Quality System models (i.e. AS/NZS ISO 9001, 9002, 9003) is appropriate to the Works in the circumstances of that work and the policies of the Principal to the Contract.

348. Those standard models may be expanded or reduced by a Principal in specifying its detailed quality assurance requirements to account for special considerations of the characteristics of specific Works. Depending on the needs, a Principal might:

- Specify the requirements of the appropriate Standard without change

- Specify more exacting requirements such as documented procedures if the case requires
- Specify lower requirements such as no documented procedures where called for in the Standard

349. In addition to the relevant Standard to be applicable, the Contract should also provide the Principal's requirements with respect to:

i. submission, approval and retention of quality related documentation, eg:
   - quality manuals;
   - quality plans;
   - inspection and test plans; and
   - quality records;

ii. monitoring and auditing of the supplier's quality system by the Principal; and

iii. any witness or hold points.

In addition to these requirements the particular procedures to apply where non-conforming work is discovered by the Contractor and a disposition is proposed by the Contractor to the Principal which would vary the requirements of a Contract should be stated, to tie in with the possibilities that may be available under a Contract should be stated, eg. in lieu of removal and replacement leave in place but Contract price reduction to apply in consideration of accepting despite non-conformance.

350. It is not uncommon that a Principal will engage specialist independent quality assurance advisers / auditors to monitor and audit a Contractor's compliance with the quality system specified.

351. The Contract does not provide that a Contractor must implement any particular quality system in respect of the Works.

352. In view of the envisaged low value, single trade nature of work to be undertaken under the Short Form, it would not be expected that implementation of a quality system would be required in all situations.

353. Where implementation was required then the requirements would have to be specified at tender in the Specification and in such case the general comments above would be of relevance.

Non-Conformances

354. When the quality of work or materials is found to be not in accordance with the requirements of the contract it is generally referred to as being non-conforming or defective.

355. Work or materials may be found to be non-conforming or defective either during the course of the Works before completion or after completion during the Defects Liability Period applicable to the Works, or even after.

356. Any departure from the plans and specifications as amended from time to time at the direction of the Contract Administrator, results in the work being non-conforming. This relates to the nature of the work whether structural or decorative and also faulty material, workmanship or design, if design is part of the Contractor's obligations under the Contract. Non-conforming work may not only arise from breaches of express terms of the Contract but also breaches of warranties as to the suitability for purpose.

357. Under the Contract, the Contract Administrator may direct the Contractor what is to be done with respect to non-conforming Work.

358. In respect of non-conforming or defective work discovered during the progress of the Works before completion, where a quality system is required to have been implemented, that system will contain procedures and instructions detailing and requiring the corrective action to be taken in event of discovery of non-conformance in addition to the specific contractual provisions for non-conforming work (i.e. Clause 2.7). The Contractor will in such cases initiate a proposed disposition of the non-conformity which is a description of the proposed action to be taken by him to resolve (dispose of) the non-conformity.

359. Care must be taken in any interaction the Contract Administrator may have in the Contractor's quality system procedures and activities, that the rights of the Commonwealth are not compromised or obligations of the Contractor under the specific contractual provisions are not reduced by signing off proposed dispositions etc. without proper consideration, in context of those specific contractual provisions.

360. By way of illustration the Contractor may discover that the slump of one load of concrete for a road pavement was outside the specified requirement and in a proposed disposition he determines that no further action is required as the concrete will still reach full strength when cured. The quality assurance system requires the proposed disposition to be endorsed by the Contract Administrator. In determining the option required by the Contract Administrator, whilst strength may not necessarily be affected, the primary design consideration may have been shrinkage control or concrete consistency throughout the works.

361. To simply 'sign off' a Contractor's proposed disposition of the action to be taken to dispose of a non-conformance, without proper consideration, will prejudice the Commonwealth's ability to later require rectification of the non-conforming work.

362. This is required to prevent the possibility of arguments being raised relative to estoppel or waiver as to subsequent direction of the Contract Administrator under those provisions of either form constituting extra work by the fact that the Contract Administrator had already acknowledged a proposed disposition by the Contractor.

363. **Even though a quality system may exist, the specific contractual provisions should be utilised to direct what the Commonwealth requires with respect to non-conforming work.**

364. Until such direction is given under the specific contractual provision, the Contract Administrator / Commonwealth will have no entitlement to invoke the other parts of that provision relating to cost in event of failure to correct.

365. In determining what may constitute work which is non-conforming, care must be exercised in interpreting and also ensuring that all provisions of the Contract relating to the work in question (express or implied) are properly considered in establishing the benchmark obligation under the Contract from which to measure. (Refer paragraph 84 of this DEI.)

366. Where the Contract Administrator orders rectification during the course of the Works prior to completion, the powers of the Contractor during the Defects Liability Period are not affected, nor are the Commonwealth's rights at common law.

367. The Contract Administrator does not owe a duty to the Contractor to carry out an investigation which would have disclosed the non-conformance or defect, nor does the Contract Administrator owe any duty to tell the Contractor during the course of construction that he is going wrong or where he is wrong.

368. The Contract permits the Contract Administrator to direct the Contractor to undertake testing in order to determine the Contractors compliance with the Contract in respect of materials and for workmanship.

369. Where the testing indicates the work does not conform, the costs involved are the Contractor's responsibility but where the work is found to conform, then subject to notification and particularisation requirements, the Commonwealth will have to bear the cost.

370. In respect of non-conforming or defective work discovered during the Defects Liability Period (after Completion), again the Contract Administrator / Commonwealth will have no entitlement to invoke other parts of the provisions of either form of Contract, unless a direction is given under the non-conformance provisions.

371. Notwithstanding the Contractor's obligation to rectify non-conforming or defective work under the express provision of the Contract, there is an alternate position relative to breach of the duty to execute and complete the Works in accordance with the Contract.

372. Generally at the end of the Defects Liability Period the Contractor is paid any outstanding retention or security monies.

Following final payment the right of a Principal to seek damages under the Contract in respect of defective work is severely limited.

374. Warranties would, however, continue on. Should any latent defects become apparent after the end of the Defects Liability Period, specific legal/technical advice should be sought in context of all circumstances including any express warranties that may be held

375. Clause 2.7 provides the Contract Administrator with the powers and procedures to be followed where non-conforming or defective work is suspected or discovered during the progress of the Works prior to Substantial Completion.

376. This clause states that the Contractor must comply with any direction to:

- uncover and recover work
- carry out additional testing or retesting

in order to determine the Contractor's compliance with the Contract in respect of materials and workmanship.

377. Where such direction is made and the work is found not to comply, then the Contractor bears the costs involved with the direction and rectification.

378. If the work is found to comply, then the Commonwealth is to bear the Contractor's costs of the direction as agreed or determined by the Contract Administrator.

379. No definition is provided as to what comprises 'costs' in such a situation. Accordingly it is believed it will represent the reasonable costs of the Contractor including allowances for margins and overhead in similar fashion to a variation.

380. Based upon the provisions of Clause 2.6 the Contractor is not entitled to an extension of time for delay caused by an instruction by the Contract Administrator under Clause 2.7.

381. This does not mean that the Contract Administrator has an unfettered power. If it could be demonstrated that a Contract Administrator abused this power and directed wholesale uncovering, recovering, additional testing and retesting without proper justification, it could be possible for such to be argued as a breach of Contract and for the Contractor to be then successful in terms of entitlement to EOT (if delayed) with associated 'agreed compensation.'

382. The Contract Administrator may direct the Contractor under Clause 2.7 to remove, replace or correct non-conforming work within the time he specifies.

383. The time specified will be required to be reasonable within the context of all the circumstances.

384. Should the Contractor not carry out the rectification without that time then the Contract Administrator is to determine the cost of having the work completed by another Contractor and the Contractor shall pay the Commonwealth the amount so determined. In reality that cost would be taken into account in determining payment under Clause 2.10.

385. An important limitation on the power of the Contract Administrator under Clause 2.7 is that it only extends to the removal, re-execution, replacement of non-conforming or defective work and consequently, failing the agreement of the parties, it would appear that the Contract Administrator can only:

- require the re-execution of the work even though a variation to the Works may be the more economical way of overcoming the non-conforming or defective work, and
- if a variation is ordered then the Contractor would be entitled to payment.

386. Clearly under these circumstances, it is sensible to negotiate a satisfactory outcome with the Contractor.

387. There is no power for the Commonwealth under Clause 2.7 to actually call in others to fix non-conforming and defective work where the Contractor fails or refuses to rectify it. Only the cost determined to have the rectification done by another Contractor is to be taken into account.

388. Where the Contractor refused to do so before Substantial Completion, it would represent grounds for cancellation under Clause 2.13 and the Commonwealth would also have rights at common law.

389. Clause 2.11 'Defects Liability Period' provides for a Defects Liability Period during which time the Contractor is obliged to rectify, within the time directed by the Contract Administrator, all minor omissions and defects which existed at Substantial Completion, and others that became apparent during the Defects Liability Period.

390. The Contract simply provides for the Contractor to rectify the Works within the time required or failing that the Contract Administrator is to determine the cost of having the non-conforming part(s) of the works fixed by another Contractor and the Contractor is to pay the Commonwealth the costs so determined.

391. Effectively, those determined costs will be deducted from any retention moneys then held under Clause 2.10.

392. If the money held as retention is insufficient to cover the cost of rectification where the Contractor fails or refuses to do it, the Commonwealth will be left to whatever legal means outside the Contract are open to it to recover the balance due.

393. It should be noted that cancellation for default at this stage will serve no purpose under the provisions of Clause 2.13 as its prime thrust is for default prior to Substantial Completion, not after and during the Defects Liability Period.

394. The Commonwealth will therefore be reliant on its common law entitlements in such a case.

COMPLETION

Completion - Generally

395. In all construction Contracts, completion occurs at the point where the state of the Work's construction is such that are ready for occupation or intended use in all ways relevant to the Contract.

396. That state of the Work's construction is defined and known by different terms in various Contracts and includes:

- Completion
- Practical completion
- Substantial Completion

397. It basically means the same point in state of construction but various Contracts by Special Conditions or specification requirements, may define certain elements that are mandatory to be produced (eg. as built drawings) before the Works are considered to have reached completion, whereas others may regard those same elements as a minor omission, not affecting the formal recognition of the state of completion under the Contract.

398. This stage in construction of the Works is of considerable significance in the course of a Contract, in that it signals:

1. That any further liability of the Contractor for liquidated damages has ceased,
2. The defects liability period has commenced,
3. That release of further funds to a Contractor may occur subject to the terms of the Contract (eg. reduction in security deposit),
4. The risk of the Works is passed to the Principal, ie his insurance no longer applies, and
5. The termination of some of the Contract Administrators powers under some Contracts.

399. Some Contracts may require various discrete Sections of the Works to be completed at different (earlier) times to the whole of the Work to be completed. In such cases the terms of the Contract usually apply the completion provisions to each Section as though it was a discrete Contract, again evidencing points of significance to rights and obligations of both parties.

400. Whilst the Contract does not expressly provide for use of the Works or part thereof prior to completion, Clause 2.4 does state that possession of the Site is not exclusive or uninterrupted. It would be expected that early use would be specified in documents at tender to enable the Contractor to allow for such. Notwithstanding this interference causing delay will also amount to a breach as detailed above entitling the Contractor to an EOT and agreed Compensation under Clause 2.6

401. The Contract Administrator is required to notify the Contractor when he is satisfied that completion, however defined under the relevant Contract, has been achieved.

402. It will be incumbent upon the Contract Administrator to determine that the Works offered up do in fact meet the defined requirement for completion and such will have to be determined within a reasonable time having regard to the relevant circumstances as neither form imposes an express time limit. (Refer paragraphs 234-254 of this DEI.)

Substantially Complete

403. The Contract uses the term 'Substantial Completion' defined at Clause 2.9 as:

'(a) when the Works are capable of use for their intended purpose; and

(b) the Works are finished except for minor defects.'

404. Under the provisions of Clause 2.9, the Contractor is to inform the Contract Administrator when he is of the opinion that the Works have reached Substantial Completion.

405. If the Contract Administrator agrees with the Contractor's opinion he is to determine when the Works reached Substantial Completion and notify the Contractor of his determination.

406. The intent of the provisions of Clause 2.9 is to bring on a dispute (if any) as to the state of completion rather than a dispute over payment for work, as non payment for work represents a fundamental breach.

407. Whilst the clause is silent as to what is required of the Contract Administrator if he does not agree with the Contractor's opinion, it is believed implicit that the Contract Administrator must advise the Contractor of his non agreement and why, in order that there can be no doubt and allow corrective action to be taken or non agreement and the dispute provisions to be initiated.

408. A suggested proforma notification, for either case, (SF 13) is attached at the end of this DEI.

409. It is important to note that where the Contractor has failed to achieve Substantial Completion by the due date under the Contract (as extended, if applicable) Liquidated damages at the rate set in clause 2.6 are payable for each day until the Works are Substantially Complete. (Refer paragraphs 125-233 of this DEI.)

410. The Contractor is entitled to payment when the Works are Substantially Complete under Clause 2.10. (Refer paragraphs 234-254 of this DEI.)

411. The Defects Liability Period specified in Clause 2.11 runs from when the Works reached Substantial Completion. (Refer paragraphs 324-394 of this DEI.)

412. Substantial Completion is a key date under the default provisions at Clause 2.13 as to costs calculation.

413. It is for these reasons that it is imperative that a Contract Administrator act expeditiously in carrying out his obligations under Clause 2.9.

414. **To assist in timely action, it is believed that as the project nears completion, all outstanding works should be noted and conveyed to the Contractor, merely as a matter of record, so he is aware of why the works may not achieve Substantial Completion unless particular items are actioned.**

415. Of course, when prepared prior to completion, there will naturally be items outstanding on such a list which would be completed in the natural progression of work until completion. A listing such as this is to be viewed in context of its usefulness as a checklist, not seen as being negative or obstructionist.

416. As items are completed they may be deleted so that hopefully by the due date for completion, there remains no work outstanding to affect the achievement of Substantial Completion as defined in the Contract.

Security Deposits/Retention

417. As noted at paragraphs 395-402 above, the reaching of completion (however described) in the construction of a project is the trigger for certain events.

418. Depending on the form of Contract, it can mean that the majority of risk of the works then passes to a Principal and in keeping with that change, it is often provided that a reduction occur in the amount of security being held by a Principal for the due and proper performance of the Contract by the Contractor.

419. Security under the Contract is by way of retention of 5% of the Contract Sum from payment. (Refer paragraphs 236-254 of this DEI.)

420. When reaching Substantial Completion there is no reduction in retention moneys then held as security under Clause 2.10.

421. In fact, if the Commonwealth preference for payment only on Substantial Completion applies to the Contract, 5% retention is to be deducted from the Substantial Completion payment for the Works.

422. Retention is not paid to the Contractor until the end of the Defects Liability Period under Clause 2.11.

DISPUTES

Disputes - Generally

423. Disputes and / or differences commonly arise during the construction of a project.

424. The meaning of a dispute or difference is wide. It can range from no more than a mere failure to agree, ignoring or lack of reply to a claim to the adversarial position where a claim has been formally rejected.

425. The dispute or difference will be dealt with in accordance with the provisions of the particular Contract, depending upon the nature of the dispute or difference.

426. There is legal precedence to suggest that 'a dispute arises when one party claims something and the other party notifies the other that he rejects the claim'.

427. Resolution of disputes, depending upon the Contract, can include:

- Negotiation
- Alternate Dispute Resolution methods, eg:
    - ConciliationMediation
    - Facilitation / Moderation
    - Valuation
    - Appraisal
    - Mini trial
- Arbitration
- Litigation

Dispute Resolution

428. Clause 2.12 provides the parties' (to the Contract) agreed intent as to how disputes are to be resolved.

429. In keeping with the size and nature of Works envisaged to be undertaken under this form of Contract, the procedures are simple.

430. If a dispute arises at any time the first step in procedures is that notification must be given to the other party and the Industry Expert named in Clause 2.12 by the 'disputant'.

431. Adequate particulars should be presented by the disputant at the time of this notice, otherwise the other party will not know what it is that he is required to answer.

432. There is no express time within which this notification is required from the dispute arising, nor is there any bar upon raising a dispute at any time.

433. In order to protect the Commonwealths interests, it is suggested that just prior to final payment at end of Defects Liability period, a 'release of all claims' should be obtained from the Contractor. (Refer paragraphs 269-280 and proforma CA 6 at the end of this DEI.)

434. A dispute is defined at Clause 2.12 as:

- 'any disagreement the Contractor may have with any instruction, direction or determination of the Contract Administrator; and
- any other dispute or difference between the Commonwealth and the Contractor

arising out of or in connection with the Contract or the Works.

435. It would not appear that the Commonwealth may initiate a dispute in respect of a direction, instruction or determination of the Contract Administrator, particularly as the Contract Administrator is acting as the Commonwealth's agent. However, the Commonwealth may initiate a dispute about other matters.

436. The nomination of the Industry Expert at Contract formulation (Tender) must not be overlooked. Difficulties may be experienced later, when a dispute has arisen, in the parties reaching agreement as to an acceptable Industry Expert.

437. In such an event, it may be possible for the Commonwealth and Contractor to agree on a nomination from a local industry or professional association, eg. ACEA, MBA, Institution of Engineers, RAIA, Institute of Arbitrators Australia

438. The second step in the process defined at Clause 2.12 is that it is mandatory that the Contractor and Contract Administrator meet to attempt to resolve the dispute.

439. This meeting must occur within 7 days of the giving of notice of the dispute.

440. A proforma of a suggested letter requiring this meeting (SF 14) is attached at the end of this DEI.

441. If the Contract Administrator and Contractor are unable to resolve the dispute within 14 days of the notice of dispute, it must be referred to the nominated Industry Expert for decision.

442. It is assumed by this time that the agreed and nominated Industry Expert will have indicated that there is no impediment to his availability to act at the requisite point in time and that any requirements of the Expert as to matters such as adjudication agreement, procedures etc. have been resolved.

443. To refer the dispute to the Expert, there are no particular procedures set down by the Contract. Accordingly, it is recommended that the Contract Administrator perform this referral to provide some regulation and certainty to the procedure. A possible proforma for reference of a dispute (SF 15) is attached at the end of this DEI.

444. It is important to note that in any dispute the respondent must be afforded the right of reply to the matters in dispute as particularised by the claimant (disputant).

445. In addition no contact should occur with the Industry Expert, without the full knowledge of both parties, to preserve the actual and perceived independence and impartiality of the Industry Expert.

446. The Industry Expert is to charge his costs to both the Commonwealth and Contractor in equal proportions and separately.

447. If the Contractor does not pay his portion, the Expert would have to ask the Commonwealth to pay the Contractor's costs.

448. It is to be noted that it is not mandatory for the Commonwealth to pay the Contractor's debt but if it does, the Commonwealth is to recover those costs as a debt due by the Contractor. (Refer paragraphs 234-254 of this DEI.)

449. The Industry Expert has the power under the clause to seek advice from others as seen fit, however with the requirement to give a decision with 14 days of the referral, that scope will be limited.

450. The Expert does not need to give reasons for the decision and it is final and binding on both the Commonwealth and the Contractor.

451. It is expressly stated in Clause 2.12 that neither party may challenge the decision of the Expert in any other proceedings.

452. Whilst it appears that there is no further recourse for resolution under the Contract and arguably difficult to raise the dispute in any other forum, Courts will often accept a claimant and if both the parties so desired, they could agree to formulate an arbitration agreement.

453. One could not see this occurring unless the decision of the Expert was so dramatically wrong or the Expert was guilty of gross misconduct or fraud.

454. Notwithstanding the provisions of the Contract, it would be expected that considerable negotiations would have preceded a dispute (if any) formally arising for resolution by an Industry Expert.

455. In that regard the Contract Administrator may engage independent specialist advisers to assist in analysing the matters at issue and to provide an analysis of risks faced by the Commonwealth in respect of them.

DEFAULT AND TERMINATION

Generally

456. Construction contracts usually contain express provisions allowing a Principal to terminate (determine) the Contract if prescribed events occur.

457. Common events specified as giving such a right may be failure to progress the Works at a satisfactory rate, suspension of the Works by the Contractor without due cause, or insolvency of the Contractor.

458. In addition to the express provisions of the Contract, common law rights exist entitling the Contract to be brought to an end by an innocent party, accepting a breach and repudiation of the Contract by the other party (eg. failure to pay progress claims by time specified by Principal) or through frustration where without default of either party, the Contract has through intervening circumstances become incapable of being performed without its performance being radically different.

459. A Contract may also be terminated by mutual agreement subject to the terms of that agreement.

460. The determination provisions of a Contract are desirable to enable termination for events or circumstances which do not amount to a repudiation at common law and may also clearly detail the financial consequences of termination rather than relying upon the common law remedy of 'damages' which may be unclear.

461. The implementation of termination provisions is a drastic step with grave consequences to the defaulting Contractor (if done correctly) or similar grave consequences to the Commonwealth (if done incorrectly).

462. The Contract Administrator has no power under the Contract to terminate. That power is reserved for the Commonwealth although under the Short Form, the Contract Administrator may ultimately carry out the mechanics at the Commonwealth's behest.

463. Where circumstances arise that place the Contractor in default of his obligations under the Contract, no steps should be taken down the termination procedural path, without first seeking specific specialist legal advice in context of the circumstances.

464. Failure on the part of the Commonwealth to get it right in terms of justification and / or procedures may have serious implications for the Commonwealth's position.

465. Whilst the Contractor should not be allowed to flagrantly disregard his obligations, the particular event giving rise to default should be considered in context of the consequences of termination, including:-

- the effect on the Project
- the costs to complete by other means (usually higher)
- the costs of the termination
- the effect on sub-contractor's performances
- possibility of delay

466. Clause 2.13 provides the initiating events upon which the Commonwealth may terminate the Contract and the procedures that will apply relative to the costs of completing the Work and impact upon the Contractor.

467. The key points and procedures embodied in this clause are:

i. If the Contractor is wound up or declare insolvent; fails to carry out an instruction of the Contract Administrator within the time specified or a reasonable time; is not progressing the work at a rate of progress satisfactory to the Contract Administrator; or fails to comply with his or her obligations under the Contract, then the Commonwealth may:

   - notify the Contractor in writing that the Contract is cancelled;
   - suspend payments due or to become due under 2.10; and
   - assess the costs of substantially completing the Works by another Contractor.

ii. If the Contract is cancelled, the Contract Administrator is to calculate the difference between the cost of Substantially Completing the Works by another Contractor and the amount of suspended payments plus retention.

468. It is important to note that unless and until action is actually taken to cancel and suspend payment, then the Contractor is legally entitled to be paid any monies that have become due and payable. Failure by the Commonwealth will be a breach of Contract, the ramifications of which may seriously compromise the Commonwealth.

469. By way of simplistic illustration as to entitlement in case of termination is the following scenario:

i. A Contractor was engaged to erect a fence for the lump sum of $10,000 with payment due only on Substantial Completion of the Works and with work having progressed to approximately 90% complete, the Contractor refuses to complete them despite instruction do so.

ii. The Commonwealth through the Contract Administrator cancels the Contract and suspends payment under Clause 2.13

iii. The Contract Administrator obtains a price of $1,750 from another Contractor to bring the works to Substantial Completion.

iv. The defaulting Contractor would be entitled to the following:

Cost of Substantially completing by others	$1,750
Contract Sum payable at Substantial Completion	$10,000
Diff (excess)	$8,250

v. In this case, as the payment had not become due and payable (i.e. Substantial Completion had not been achieved) it was legitimate to suspend payment and hold the amount that would have been due, in accounting for the difference

470. If however the following scenario existed:

i. Payment was specified in Clause 2.10 to be due in the amount of $9,000 at a Stage, say equating to 75% of work complete.

ii. The Contractor had correctly invoiced and the Contract Administrator had agreed that work had reached the Stage scheduled some say 6 weeks prior.

iii. Because the Commonwealth was concerned that the Contractor was rumoured to have financial difficulties and would probably be wound up, cancellation was being contemplated and investigated and the payment was being held until a decision was made.

iv. In this case the Contractor was actually entitled to the payment of the $9,000 at least 2 weeks (approx) prior. The Commonwealth is in breach for not having made the payment when due.

v. In the scenario above for cost completion, the Commonwealth would only have recourse to $1,000 with the remaining $750 shortfall being sought from the Contractor.

vi. If the Contractor had been wound up, the Commonwealth may have been exposed and also embarrassed if the payment would have altered the situation.

PROFORMAS - SHORT FORM CONTRACTS

Standard letters relating to clauses in the Short Form Contract are available.

SUGGESTED COMMON ADMINISTRATIVE PROFORMAS

Common administrative proformas are available.